No. 2388

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES,"

Appellant,

vs.

HAMMOND LUMBER COMPANY, a Corporation,

Appellee.

In the Matter of the Petition of the SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Apostles.

Upon Appeal from the United States District Court for the Northern District of California, First Division.

FILMER BROS. CO., PRINT. 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court, and included in said transcript the following pleadings, proceedings and papers on file, to wit:

(1) All those papers required by section I of paragraph I of Rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, excluding the testimony taken on the reference to ascertain value.

(2) All pleadings, motion, claims and answers, and the exhibits annexed thereto. [1*]

(3) The monition and all proceedings taken, made and returned by the United States Marshal to this Court.

(4) The opinion of the Court.

(5) The final decree and notice of appeal.

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*Page-number appearing at foot of page of original certified Record.

(6) The assignment of errors.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Petitioner and Appellant.

[Endorsed]: Filed Mar. 12, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

In the District Court of the United States in and for the Northern District of California, First Division.

No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Statement of Clerk U. S. District Court.

PARTIES.

PETITIONERS: Shipowners and Merchants' Tugboat Company, a corporation, owners of the tugs "Dauntless" and "Hercules," etc.

CLAIMANTS: The Hammond Lumber Company, a corporation, claimants of raft of piling. [3]

PROCTORS

for

PETITIONERS: Messrs. Page, McCutchen, Knight and Olney and Ira A. Campbell, Esquire, San Francisco, California.

CLAIMANTS: W. S. Burnett, Esquire, and Messrs. Denman and Arnold, San Francisco, California.

PROCEEDINGS.

1912.

February 27. Filed verified Petition for Limitation of Liability. Filed Order referring cause to James P. Brown, United States Commissioner for the Northern District of California, at San Francisco, for the purpose of making appraisement of the value of the interest of said petitioner in the steam tugs, etc.

March 23. Filed Report of United States Commissioner James P. Brown, as per order of February 27, 1912, as to appraised value of interest of petitioners in steam tugs, etc.

March 29. Filed Order confirming the Report of James P. Brown, United States Commissioner, as to value of interest of petitioners in steam tugs, etc., and ordering petitioners to file bonds accordingly.

March 30. Filed order restraining all other suits growing out of this matter. [4]

March 30. Filed Stipulation (Bond) to cover value of Tug "Hercules," in the sum of $70,000, with the American Surety Company of New York, as Surety.

March 30. Filed Stipulation (Bond) to cover value of Tug "Dauntless," in the

1912.

sum of $45,000, with the American Surety Company of New York, as Surety.

April 2. Issued Monition, citing all persons claiming damages, etc., to appear before said Court and make due proof of their respective claims before James P. Brown, United States Commissioner, at San Francisco, California.

On a later date the United States Marshal made a return on the Original Monition as follows:

"United States of America,
Northern District of California.

San Francisco, April 13, 1912.

I hereby certify and return that I served the annexed Monition on the Hammond Lumber Company, a corporation, 260 California Street, San Francisco, by handing to and leaving an attested copy thereof with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, personally on the 2d day of April, A. D. 1912.

I further return that at the request of Messrs. Page, McCutchen, Knight and Olney, the proctors for the petitioners herein, [5] I

1912.

posted a certified copy of the annexed Monition in the following public places in the City of San Francisco, to wit, one at the Hall of Justice at Kearny and Washington Streets, one at the City Hall, located on the south side of Market Street, between Eighth and Ninth Streets, and one at the United States Postoffice and Courthouse Building at Seventh and Mission Streets.

C. T. ELLIOTT,
U. S. Marshal.
By M. J. Fitzgerald,
Office Deputy."

And on July 12th, 1912, the United States Marshal as aforesaid filed a Supplemental Return, which was in part the same as the previous return and further that he, the said Marshal, had caused to be published in the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted), a copy of said Monition once a week from the fourth day of April, 1912, to and including the 9th day of July, 1912. Said Supplemental Return was signed "C. T. Elliott, U. S. Mar-

1912.

shal. By M. J. Fitzgerald, Office Deputy." (See transcript for full Supplemental Return.)

July 11. Filed United States Commissioner's Report on Claims.

12. Filed Interlocutory Decree.

Filed Order Allowing Petitioners to Amend their Original Petition, for Limitation of Liability.

Filed Amended Petition for Limitation of Liability. [6]

July 30. Filed Claim of the Hammond Lumber Company, a corporation, to the raft of piling, etc.

30. Filed Answer of the Hammond Lumber Company, a corporation, to the Petition for Limitation of Liability.

30. Filed Exceptions of the Hammond Lumber Company, a corporation, to the Petition for Limitation of Liability.

September 27. Filed Objections and Answer of Petitioners to Claim of the Hammond Lumber Company, a corporation.

October 23. Filed Notice of Motion of Hammond Lumber Company, a corporation, for Dismissal of Petition for Limitation.

1913.

December 13. A hearing was this day had before the District Court of the United States for the Northern District of California, First Division, at the Court-room thereof, in the City and County of San Francisco, before the Honorable M. T. Dooling, Judge, and after argument of the respective parties, the Court ordered that the Motion of Hammond Lumber Company to dismiss the Petition for Limitation of Liability stand submitted to the Court for decision.

1914.

January 10. Filed Opinion Granting Motion to Dismiss, etc.

13. Filed Final Decree.

February 5. Filed Notice of Appeal.

March 20. Filed Assignment of Errors. [7]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. ——.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Petition for Limitation of Liability.

To the Hon. JOHN J. DE HAVEN, Judge of the United States District Court for the Northern District of California, Sitting in Admiralty:

The petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, for limitation of liability, civil and maritime, respectfully shows:

I.

That petitioner herein, The Shipowners and Merchants' Tugboat Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and maintains its principal place of business in the City and County of San Francisco, said State.

II.

That it now is, and was during all the times hereinafter mentioned, the owner of the steam tugs [8] "Dauntless" and "Hercules," together with their engines, boilers, boats, tackle, apparel, furniture and appurtenances.

III.

That said steam tug "Dauntless" is an American vessel of 144.24 net tons burden, and duly enrolled according to law in the office of the United States Collector of Customs for the District of San Francisco, State of California, and said vessel is now in the port of San Francisco, in the Northern District of California, and within the jurisdiction of this Honorable Court.

IV.

That said steam tug "Hercules" is an American vessel of 221.49 net tons burden, and duly enrolled

according to law in the office of the United States Collector of Customs for the District of San Francisco, State of California, and said vessel is now in the port of San Francisco, in the Northern District of California, and within the jurisdiction of this Honorable Court.

V.

That heretofore, on the 9th day of September, 1911, the Hammond Lumber Company delivered a large raft of piling to the master of the petitioner's tug "Dauntless" at Astoria, Oregon, to be towed to the port of San Francisco, California; that said tug made fast to said raft by means of a long steel towing hawser, attached to the towing machine on said tug, and fastened to said raft by means of a long [9] heavy chain attached to said raft by the employees of said Hammond Lumber Company constructing said raft; that the master of said tug "Dauntless" was unable to procure the services of a bar tug to assist him with said raft out of the Columbia River and across the bar at the entrance thereof, and thereupon said master called to his assistance the tug "Hercules," which made fast to said tug "Dauntless" by means of a long steel towing hawser attached to the towing machine on said "Hercules" and to the forward bitts of said tug "Dauntless."

That upon said tugs being made fast to said raft as aforesaid, they proceeded with said raft down the river from Astoria, and continued during the afternoon through the channel at the entrance of said river toward the open sea; that at the time said tugs started upon said tow, the weather, sea and tidal con-

ditions were favorable to a successful towing of said raft across the bar; that in making said tow of *said kept* in the usual channel down said river taken by vessels proceeding to sea, passing the usual and a safe distance off and to the northward of the buoys marking the southerly side of said channel at the entrance of said river; that as it reached channel buoy No. 4, said raft stuck, and said tugs were unable to make any headway with it; that at about the time said raft so stuck, the tide began to ebb strong [10] and the sea at the entrance began to make, until a tremendous sea was running in across the bar and up the entrance against the increasing ebb tide; that by reason of said sea and tide, said raft became unmanageable, and, despite every effort of said tugs, said raft was gradually turned and swept broadside against said sea until the after end of said raft tailed off towards the breakers on Peacock Spit; that said tugs continued pulling upon said raft until after it passed the black bouy marking the northerly side of said channel off Peacock Spit, when suddenly and without warning said raft pulled the towing hawser off the towing machine on the tug "Dauntless," and upon so being freed, drifted into the breakers on Peacock Spit, and became a total loss.

VI.

That after the loss of said raft, said tugs returned to the port of Astoria, and said tug "Dauntless" thereafter, on the 12th day of September, 1911, arrived at the port of San Francisco, from whence she had sailed to tow said raft from said port of Astoria to said port of San Francisco, and said tugs are now

in the same condition as they were at the close of their aforesaid respective voyages.

VII.

That said tugs "Dauntless" and "Hercules" were, and are, used and employed by petitioner herein in the business of towing between ports and places on the Pacific Coast of North America, and the sounds, bays [11] and rivers thereof, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court, and during all of said times were good, staunch, able and seaworthy vessels, and were at all times fully and properly manned, officered, equipped, supplied and appareled, and well and sufficiently fitted and supplied with suitable boilers, machinery, towing machines, lines, hawsers, boats, tackle, apparel, appliances and store, all in good order and condition and sufficient for the business and voyages in which they are engaged, and particularly for towing said raft of piling as aforesaid.

VIII.

That the loss of said raft of piling, and all other damages and injuries, whether of persons or of property, done, occasioned and incurred upon the voyage of said tug "Dauntless," or the said tug "Hercules," were done, occasioned and incurred without the consent, or privity, or knowledge, or design, or neglect of the petitioner herein, or of any of its directors, or officers, or servants, or of either of said tugs.

IX.

That said Hammond Lumber Company, a New Jersey corporation, maintaining an office at No. 260 California Street, San Francisco, California, has hereto-

fore commenced in the Circuit Court for Clatsop County, State of Oregon, an action against petitioner herein, wherein recovery is sought for the alleged value of said raft and its equipment. [12]

X.

That your petitioner desires to contest its liability and the liabilities of each of said tugs "Dauntless" and "Hercules" for the injuries, losses and damages, whether to persons or to property, caused, occasioned or incurred upon said voyages, and particularly the loss of said raft of piling, and also hereby claims the benefit of limitation of liability of your petitioner provided for in sections 4282 to 4289, inclusive, of the Revised Statutes of the United States, and also hereby claims the benefit of limitation of liability of your petitioner provided for in the act of June 26, 1884, and particularly the benefit of the provisions of section 18 of said act (23 St. L. 57), and also hereby claims the benefit of limitation of liability provided for in section 4289 of the Revised Statutes of the United States as amended by the act of June 19, 1886 (24 St. L. 79), and particularly section 4 of the last mentioned act, and also hereby claims the benefit of any and all acts of the Congress of the United States, if any, amendatory of the several sections and acts aforesaid, or any thereof; and your petitioner is now ready, able and willing, and hereby offers to give its stipulation or stipulations, with sufficient sureties, conditioned for the payment into this Court by your petitioner of the value of said tug "Dauntless," and "Hercules," if required, as they and each of them were immediately after the termin-

ation of said voyages upon which said raft was lost, with interest [13] thereon, together with their and each of their freight pending, if any were pending, though your petitioner respectfully represents that none was pending, such payment to be made whenever the same shall be ordered herein; except that your petitioner respectfully offers to give its said stipulation for the payment into this court of the value of said tug "Hercules" and her freight, if any, pending, under protest, for the reason that if there is any liability on the part of your petitioner for the loss of said raft, it is solely because of the breaking away of said raft from said tug "Dauntless" and was not because of, or contributed to by, any act or thing done, occasioned or incurred by said tug "Hercules," or any of its officers or crew, and because the loss of said raft was not participated in by said tug.

XI.

While not in any way admitting your petitioner is under any liability for the losses and damages occurring as aforesaid, and your petitioner here claiming and reserving the right to contest in this court any liability therefor, either personally, or of said tugs "Dauntless" and "Hercules," or either of them, your petitioner claims and is entitled to have limited its liability, if any, in the premises, to the amount or value of its interest, as aforesaid, in the said tug "Dauntless," as it was at the close of said voyage, or if not in said tug "Dauntless" [14] alone, then in said tugs "Dauntless" and "Hercules" as they were at the close of their respective voyages.

WHEREFORE your petitioner prays that this Court will order due appraisement to be had of the value of the said tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances as the same were immediately after the close of their aforesaid respective voyages, and order and cause due appraisement to be had of the amount of the freight pending, if any, at the close of said voyages, and that stipulation or undertaking may be given by your petitioner, with sureties, conditioned for the payment into court of such appraised value whenever the same shall be ordered, and that this court will, upon the filing of such stipulation by your petitioner, issue or cause to be issued a monition against the Hammond Lumber Company and all other persons claiming damages of your petitioner by reason of injuries to persons or to property occurring or arising upon said voyages or resulting from the loss of said raft, citing them, and each of them, to appear before this court and there make due proof of their respective claims, at a time to be therein named, as to all of which claims your petitioner will contest its liability, and the liability of said tugs "Dauntless" and "Hercules," and particularly the liability of said tug "Hercules" [15] independently of the limitation of its liability claimed under the statutes and sections above stated.

That this Court may be pleased to determine that no liability exists on the part of your petitioner or of said tug "Hercules" for any act or thing done or occasioned by said tug upon said voyage upon which said raft was lost, and particularly that no lia-

bility exists on the part of your petitioner, or said tug "Hercules" for the loss of said raft, and that this Court may be pleased to release the stipulation for the value of said tug "Hercules" and her freight, if any, pending, for the reason that said tug, nor her officers, or crew did not participate in the loss of said raft.

That in case it shall be found that any liability exists upon the part of your petitioner by reason of injuries to persons, or loss of, or damage to property, done, occasioned or incurred upon said voyages, and particularly the loss of said raft, as aforesaid (which your petitioner denies and prays may be contested in this court), then that such liability shall in no event be permitted by this Court to exceed the value of said tug "Dauntless" and her freight, if any, pending, or if this Court should find that liability exists on the part of said tug "Hercules," or of your petitioner, for any act or neglect of said tug, her officers or crew, that such liability shall in no event be permitted to exceed the value of said tug "Dauntless" and "Hercules," and their freights, if any, pending [16] at the close of their respective voyages upon which said raft was lost, as aforesaid, and as such values may be determined by the appraisement of such interests as hereinbefore prayed; and that the moneys secured to be paid into court as aforesaid shall and may, after payment of costs and expenses therefrom, be divided *pro rata* among the several claimants, in proportion to the amounts of their respective claims, as by this Court adjudged; and that in the meantime, and until final judgment of this

Court shall be rendered and entered herein, this Court shall enter an order herein restraining said Hammond Lumber Company, their agents and attorneys, from further prosecuting said suit heretofore commenced in the Circuit Court of Clatsop County, State of Oregon, and restraining said Hammond Lumber Company and all other persons from prosecuting any suits against your petitioner or said tugs, or either of them, save in this court, only, in respect of the loss of said raft, and any and all claims arising upon said voyages, as aforesaid; and that your petitioner may have and receive such other and further relief, in the premises, as shall be deemed meet and equitable.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner.

SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY.
By W. J. GRAY,
Vice-president. [17]

United States of America,
State of California,
City and County of San Francisco.

W. J. Gray, being first duly sworn, deposes and says: *The* he is the vice-president of the petitioner herein, the Shipowners & Merchants' Tugboat Company, a corporation, and as such vice-president, is authorized to make, verify and file the petition herein on behalf of said company; that he has read the foregoing petition, knows the contents thereof and that the allegations of the same are, and each thereof is, to the best of his knowledge, information

and belief, true as stated therein and set forth.

W. J. GRAY.

Subscribed and sworn to before me this 27th day of February, 1912.

[Seal] M. T. SCOTT,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 27, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [18]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Order to Amend Petition.

ON MOTION of Ira A. Campbell, for petition herein, this day made in open court:

IT IS HEREBY ORDERED that the petition for limitation of liability filed herein may be amended by adding after the word "for" in the 27th line on the 5th page of said petition the following words and figures:

"the sum of $71,249.90, said sum being."

ENTERED this 12th day of July, 1912.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [19]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Amendment to Petition for Limitation of Liability.

To the Honorable JOHN J. DE HAVEN, Judge of the United States District Court, for the Northern District of California, First Division.

Now comes the Shipowners & Merchants' Tugboat Company, a corporation, petitioner herein, and amends its petition for limitation of liability filed herein by adding after the word "for" in the 27th line on the 5th page of said petition the following words and figures:

"the sum of $71,249.90, said sum being."

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY,

By W. J. GRAY,
Vice-president,
Petitioner.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner. [20]

City and County of San Francisco,
State of California,—ss.

W. J. Gray, being first duly sworn, deposes and says: That he is the vice-president of the petitioner

herein, Shipowners & Merchants' Tugboat Company, and as such vice-president is authorized to make, verify and file the foregoing amendment to the petition herein on behalf of said company; that he has read the foregoing amendment to said petition, knows the contents thereof, and that the allegations of the same are, to the best of his knowledge, information and belief, true as stated therein and set forth.

W. J. GRAY.

Subscribed and sworn to before me this 12th day of July, 1912.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [21]

[Order Referring Matter to Commissioner for Appraisement.]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

It appearing to this Court that a petition for limitation of liability has heretofore been filed herein

by the above-named petitioner, and application having been made in open court for an order appointing appraisers to appraise the value of the steam tugs "Dauntless" and "Hercules," their engines, boilers, boats, tackle, apparel, furniture and appurtenances, together with their freight pending at the close of their respective voyages mentioned in said petition for limitation of liability; and,

Good cause therefor being shown, IT IS HEREBY ORDERED that the above-entitled matter be and the same is hereby referred to the Hon. James P. Brown, U. S. Commissioner, for the purpose of making due appraisement of the value of the interest of said petition in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, furniture and appurtenances, as the same existed at the [22] close of their respective voyages upon which the raft, mentioned in said petition, was lost, together with the amount of their freight pending, if any existed; and upon the making of said appraisement that the same be forthwith reported to this court; and,

BE IT FURTHER ORDERED that at least one day's notice of the time and place of making said appraisement be given said Hammond Lumber Company, at its office, No. 260 California Street, City of San Francisco, State of California.

Entered this 27th day of February, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Feb. 27, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [23]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Notice of Appraisement.

To the Hammond Lumber Company, No. 260 California Street, San Francisco, California.

You are hereby notified that the undersigned, the duly appointed Commissioner to appraise the value of the Steam Tugs "Dauntless" and "Hercules," their engines, boilers, boats, tackle, apparel, furniture and appurtenances, together with their freight pending at the close of those certain voyages mentioned in the petition for limitation of liability, filed herein, will make said appraisement at the office of the Clerk of the District Court of the United States for the Northern District of California, in the post-office Building, City of San Francisco, State of California, on Thursday, the 29th day of February, 1912, at the hour of two o'clock P. M., pursuant to an order of the above-entitled Court, entered herein, a certified copy [24] of which is attached hereto.

Dated San Francisco, California, February 27, 1912.

JAS. P. BROWN,
United States Commissioner.

[Endorsed]: Filed Feb. 27, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [25]

In the District Court of the United States in and for the Northern District of California.

No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Report of United States Commissioner, Jas. P. Brown (as to Appraisement).

To the Honorable Judges of the United States District Court, Northern District of California:

Pursuant to an order of Court, bearing date the 27th day of February, 1912, referring the above-entitled matter to me as United States Commissioner for the purpose of making due appraisement of the value of the interest of said petitioner in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, as the same existed at the close of their respective voyages upon which the raft, mentioned in said Petition, was lost, together with the amount of their freight pending, if any existed; and upon the making of said appraisement that the same be forthwith reported to this court.

I, Jas. P. Brown, as aforesaid, do hereby report as follows: [26]

On the 29th day of February, and on the 14th day of March, 1912, I was attended by Ira A. Campbell, Esq., of proctors for petitioner, and by W. S. Burnett, proctor for respondent, and by William J. Murray and W. J. Gray, witnesses on behalf of petitioner and A. T. Jones, a witness on behalf of respondent: That said witnesses being duly sworn did testify as hereinafter set forth in the transcript of testimony hereto annexed.

That after a careful consideration of said testimony, I find:

That petitioner herein is the sole owner of said vessels "Dauntless" and "Hercules." I further find the value of the "Dauntless" at the close of the voyage mentioned in said petition was $45,000, and the value of the "Hercules" was $70,000.

I do further find that there was no freight pending on account of either of said vessels at the close of their respective voyages mentioned in the petition herein.

All of which is respectfully submitted.

Dated March 22d, 1912.

[Seal] JAS. P. BROWN,

United States Commissioner for the Northern District of California, at San Francisco.

[Endorsed]: Filed Mar. 23, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

(Attached to and as a part of depositions of William J. Murray, W. J. Gray, et al. Said depositions omitted as per instructions of appellants.) [27]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of The Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Notice of Filing Report on Appraisement.

To the Hammond Lumber Company, a Corporation, and W. S. Burnett, Its Proctor:

PLEASE TAKE NOTICE that we have caused to be filed in open court this 23d day of March, 1912, the report of the Commissioner, James P. Brown, appraising the value of the interest of the petitioner herein in the steam tugs "Dauntless" and "Hercules," as well as the value of the freight pending, if any, at the termination of their respective voyages referred to in the petition for limitation of liability.

Dated San Francisco, California, this 23d day of March, 1912.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner. [28]

Service of the within Notice and receipt of a copy is hereby admitted this 23d day of March, 1912.

W. S. BURNETT,
Proctor for Hammond Lumber Co.

[Endorsed]: Filed Mar. 26, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [29]

[Order Affirming Report of Commissioner Appraising Value of Tugboat.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 29th day of March, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable E. S. FARRINGTON, Judge.

#15,234.

In re Petition of THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, Owner of the Tugboats "DAUNTLESS" and "HERCULES," etc.

On motion of Ira Campbell, Esqr., attorney for *petition,* herein, no objection having been made, by the Court ordered that the report of the United States Commissioner herein appraising the value of the tugboats "Dauntless" and "Hercules" be, and the same is hereby affirmed. [30]

[Order Approving Report of Commissioner Appraising Value of Interest of Petitioner in Tugs, etc.]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. ——.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

It appearing to this Court that the Shipowners & Merchants' Tugboat Company, a corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability, wherein, among other things, it prayed that an order be entered appraising the value of the interest of petitioner in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances as the same were immediately after the close of their respective voyages, for the losses arising upon which limitation of liability was sought, together with any freight pending; and,

It appearing that upon said 27th day of February, 1912, this Court entered an order referring the matter of said appraisement to the Hon. James P. Brown, United States Commissioner, for the purpose of making due appraisement of the value of the interest of said petition in said tugs, their boilers, engines,

boats, [31] tackle, apparel, furniture and appurtenances at the close of the aforesaid voyages, together with the amount of their freight pending, if any existed; and,

It further appearing that on said 27th day of February, 1912, due and regular notice was given by said Commissioner to the Hammond Lumber Company, at its office, 260 California Street, in the City of San Francisco, California, notifying said Hammond Lumber Company that said Commissioner would make appraisement of said tugs "Dauntless" and "Hercules," their engines, boilers, boats, tackle, apparel and appurtenances, together with their freight pending at the close of those certain voyages mentioned in the petition for limitation of liability, at the office of the Clerk of the District Court of the United States for the Northern District of California, in the Postoffice Building, City of San Francisco, State of California, on Thursday, the 29th day of February, 1912, at the hour of 2 P. M., pursuant to an order entered in the above-entitled court, a copy of which order was attached to said notice; and,

It further appearing that a hearing was had before said Commissioner at the aforesaid time and place, pursuant to said notice, at which hearing petitioner appeared by Ira A. Campbell, Esq., of the firm of Page, McCutchen, Knight & Olney, and Hammond Lumber Company appeared by W. S. Burnett, Esq., and that the testimony, taken by said Commissioner, and that thereafter said hearing was continued from time to time until the 14th day of March, 1912, on which date the taking of testimony in the matter of

said appraisement was concluded; and, [32]

It further appearing that there was filed in open court, on the 23d day of March, 1912, the report of said Commissioner, appraising the value of the interest of said petitioner in the tug "Dauntless," her engines, boilers, boats, tackle, apparel, furniture and appurtenances at the sum of Forty-five Thousand (45,000) Dollars, and the value of the interest of said petitioner in the tug "Hercules," her engines, boilers, boats, tackle, apparel, furniture and appurtenances at the sum of Seventy Thousand (70,000) Dollars, and further finding that no freight was pending at the termination of the respective voyages of said tugs mentioned in said petition; and,

It further appearing that due notice of the filing of the report of said Commissioner was given said Hammond Lumber Company, on said 23d day of March, 1912; and,

It further appearing that more than four days have elapsed, within which time, under the rules of this court, exceptions to the report of the Commissioner may be filed, and that no exceptions have been filed; and,

The Court being fully advised in the premises;

NOW, THEREFORE, it is hereby ordered that the report of the Hon. James P. Brown, United States Commissioner, heretofore filed herein on the 23d day of March, 1912, appraising the value of the interest of the Shipowners & Merchants' Tugboat Company, petitioner herein, in the steam tug "Dauntless," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the sum of

Forty-five Thousand (45,000) Dollars, and appraising the value of the interest of the Shipowners & Merchants' Tugboat Company, [33] petitioner herein, in the steam tugs "Hercules," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the sum of Seventy Thousand (70,000) Dollars, as said tugs were immediately after the close of their respective voyages, mentioned in the petition for limitation of liability, filed herein, be and the same is hereby approved; and,

Be it FURTHER ORDERED that the report of said Commissioner, heretofore filed herein on the 23d day of March, 1912, finding that there was no freight pending at the close of the respective voyages of said tugs, mentioned in the petition for limitation of liability, filed herein, be and the same is hereby approved.

And be it FURTHER ORDERED that the said petitioner file with this Court undertakings, with good and sufficient surety, in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with interest thereon from the 9th day of September, 1911, respectively conditioned for the payment into this court by said petitioner of the value of said tug "Dauntless" and the value of said tug "Hercules," as fixed by the report of the appraisers, heretofore filed and approved herein, whenever the same may be ordered by this Court.

Entered, this 29th day of March, 1912.

E. S. FARRINGTON,

Judge.

[Endorsed]: Filed Mar. 29, 1912. Jas. P. Brown, Clerk. M. T. Scott, Deputy Clerk. [34]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 30th day of March, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable E. S. FARRINGTON, Judge.

#15,234.

In Re Petition of SHIPOWNERS AND MERCHANTS' TUGBOAT CO., for Limitation of Liability.

Minutes Re Restraining Order.

On motion of Ira Campbell, Esq., order restraining suits against petitioner and vessels herein signed and filed. [35]

Return on Service of Writ [(Restraining Order) and Restraining Order].

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the Restraining Order on the therein named, The Hammond Lumber Co., by handing to and leaving a true, correct and attested copy thereof with G. C. Fulton, as attorney for said Hammond Lumber Company, per-

sonally, at Astoria, Clatsop County, in said District on the 4th day of April, A. D. 1912.

LESLIE M. SCOTT,
U. S. Marshal for the District of Oregon.
By J. B. Marvin,
Deputy.

(In re Petition of The Shipowners & Merchants' Tugboat Co., a Corp., Owners of the Steam Tugs "Dauntless" & "Hercules" for Limitation of Liability.)

Service..... .....$ 4.00
Travel 100 miles..... 12.00

Total.....$16.00 [36]

In the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. ——.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Restraining Order.

It appearing to this Court that the Shipowners & Merchants' Tugboat Company, a corporation, petition herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that, under and pursuant to an order of this Court entered in said cause, an ap-

praisement was made by the Honorable James P. Brown, United States Commissioner, appraising the value of the interest of said petition in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective voyages mentioned in said petition; and

It further appearing that thereafter, on the 23d day of March, 1912, the report of said Commissioner [37] was filed with this Court and the same was approved by this Court on the 29th day of March, 1912; and,

It further appearing that there has been filed with this Court, by the petitioner herein, on the 30th day of March, 1912, a stipulation with the petition herein as principal and American Surety Company as surety, approved by this court after due notice to the Hammond Lumber Company, wherein it is conditioned that the petitioner herein will pay into this court, whenever the same may be ordered either by this court or by an Appellate Court in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said tug "Dauntless," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, to wit, the sum of Forty-five Thousand (45,000) Dollars, together with interest thereon from the 9th day of September, 1911; and,

It further appearing that there has been filed with

this Court, by the petitioner herein, on the 30th day of March, 1912, a stipulation with the petitioner herein as principal and American Surety Company as surety, approved by this Court after due notice to the Hammond Lumber Company, wherein it is conditioned that the petitioner herein will pay into this court, whenever the same may be ordered either by this Court or by an Appellate Court in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said tug "Hercules," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, to wit, the sum of Seventy Thousand (70,000) Dollars, together with interest thereon from the 9th day of September, 1911; and,
[38]

It further appearing, from the petition herein, that the Hammond Lumber Company, a New Jersey corporation maintaining an office at Number 260 California Street, San Francisco, California, has heretofore commenced and is maintaining the Circuit Court for Clatsop County, State of Oregon, an action against petitioner herein, wherein recovery is sought for the alleged value of a raft of piling and its equipment lost upon Peacock Spit, at the mouth of the Columbia River, on the ninth day of September, 1911, while in tow of said tugs "Dauntless" and "Hercules," upon said voyages mentioned in said petition; and,

It further appearing that prayer is made in said petition herein for an order restraining said Hammond Lumber Company, its agents, officers and

attorneys from further prosecuting the aforesaid action, as well as all other persons from prosecuting any suits against petitioner herein, or said tugs, or either of them, save in this court, in respect of the loss of said raft, and any and all claims arising upon said voyages of said tugs mentioned in said petition; and,

The Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that, until the further order of this Court, each and every corporation, person or persons having or claiming to have any demands against said steam tug "Dauntless," or against said steam tug "Hercules," or against the Shipowners & Merchants' Tugboat Company, petitioner [39] herein, for any loss, damage or injury caused by, or arising upon the voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the ninth day of September, 1911, as set forth in the petition herein, be and they are hereby enjoined and restrained from beginning, prosecuting or maintaining any suit or suits against said tug "Dauntless," or against said tug "Hercules," or against the petitioner herein, except in this proceeding; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Hammond Lumber Company, its agents, officers and attorneys, be, and they and each of them are, hereby enjoined and restrained from further prosecuting in the Circuit Court of Clatsop County, State of Oregon, that certain action heretofore commenced by said Hammond Lumber

Company against the Shipowners & Merchants' Tugboat Company, petitioner herein, wherein recovery is sought for the value of said raft and equipment lost upon said voyages of said tugs "Dauntless" and "Hercules" referred to in the petition herein, leaving the port of Astoria, on the ninth day of September, 1911.

ENTERED, this 30th day of March, 1912.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [40]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

UNITED STATES MARSHAL'S RETURN OF SERVICE OF ATTESTED COPY OF RESTRAINING ORDER.

I, C. T. Elliott, United States Marshal, in and for the Northern District of California, hereby certify that on April, 1, 1912, I received from Messrs. Page, McCutchen, Knight & Olney, proctors for the petitioners herein, an attested copy of Restraining Order entered in the above-entitled proceeding, on the 30th day of March, 1912, and that thereafter, to

wit, on the 1st day of April, 1912, I handed to and left said attested copy of said Restraining Order with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, at [41] the office of said Hammond Lumber Company, at 260 California Street in the City of San Francisco, State of California.

C. T. ELLIOTT,
United States Marshal.
By M. J. Fitzgerald,
Office Deputy.

San Francisco, California, April 2d, 1912.

[Endorsed]: Filed April 2d, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [42]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES" for Limitation of Liability.

Notice of Presentation of Stipulations as to Tugs for Approval.

To Hammond Lumber Company and W. S. Burnett, Its Proctor:

Please take notice that the undersigned, proctors for Shipowners & Merchants' Tugboat Company, a corporation, petitioner herein, will present to the

above-entitled court, for its approval, the original stipulations of which the copies attached hereto are true and correct copies, at the courtroom of said court, in the United States Postoffice Building, in the City of San Francisco, State of California, on Saturday, the 30th day of March, 1912, at the hour of ten o'clock A. M.

PAGE, McCUTCHEN, KNIGHT & OLNEY.

[43]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES" for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug "Dauntless," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said tug, leaving Astoria on September 9, 1911, all as set forth in said petition; and,

WHEREAS the value of the interest of said petitioner in said steam tug "Dauntless," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of

this Court, at the sum of Forty-five Thousand (45,-000) Dollars, which appraisement has heretofore been approved by this Court; and

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Forty-five Thousand (45,000) Dollars, with interest thereon from the 9th day of September, 1911, conditioned as required by law; and,

WHEREAS, the parties hereto consent and agree and bind themselves, jointly and severally, in the sum of Forty-Five Thousand **[44]** (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipulator, shall pay the said sum of Forty-five Thousand (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this court, whenever the same shall be ordered by this court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal, and The

American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto duly authorized this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUG-BOAT COMPANY,

By W. J. GRAY,
Vice-president and Manager.

[Seal] Attest: J. W. CURRY,
Secty.

AMERICAN SURETY COMPANY OF NEW YORK,

By C. S. VAN BRUNDT,
Resident Vice-President.

[Seal] By HAROLD M. PARSONS,
Resident Assistant Secretary. [45]

Taken and acknowledged before me, the undersigned, this —— day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

United States of America,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath deposes and says:

That he is, and during all the times herein mentioned was, the resident Vice-president in the City of San Francisco, State of California, of The American Surety Company of New York; and that Harold M. Parsons is the resident Assistant Secretary in said city and State of said company, and that they

executed the foregoing and within stipulation for and on behalf of the said company; that said The American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT.

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved this —— day of March, 1912.

_____,

Judge. [46]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES" for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug "Hercules," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said

tug, leaving Astoria on September 9, 1911, all as set forth in said petition; and,

WHEREAS, the value of the interest of said petitioner in said steam tug "Hercules," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of this Court, at the sum of Seventy Thousand (70,000) Dollars, which appraisement has heretofore been approved by this Court; and,

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Seventy Thousand (70,000) Dollars, with interest thereon from the 9th day of September, 1911, conditioned as required by law; and,

WHEREAS, the parties hereto consent and agree and bind [47] themselves, jointly and severally, in the sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipulator, shall pay the said sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this

court, whenever the same shall be ordered by this Court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal, and The American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto duly authorized, this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY,

By W. J. GRAY,
Vice-president and Manager.

[Seal] Attest: J. W. CURRY,
Secty.

AMERICAN SURETY COMPANY OF NEW YORK,

By C. S. VAN BRUNDT,
Resident Vice-president.

[Seal] HAROLD M. PARSONS,
Resident Assistant Secretary. [48]

Taken and acknowledged before me this 29th day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

United States of America,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath deposes and says:

That he is, and during all the times herein mentioned was, the resident Vice-president in the City of San Francisco, State of California, of The American Surety Company of New York; and that Harold M. Parsons is the resident Assistant Secretary in said city and State of said company, and that they executed the foregoing and within stipulation for and on behalf of the said company; that said The American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT.

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

Approved this —— day of March, 1912.

_____,
Judge. [49]

Receipt of a copy of within is hereby admitted this 29th day of March, 1912.

W. S. BURNETT,
Proctor for Hammond Lumber Co.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [50]

[Stipulation as to Steam Tug "Dauntless."]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES" for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug "Dauntless," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said tug, leaving Astoria on September 9, 1911, all as been approved by this Court; and,

WHEREAS the value of the interest of said petitioner in said steam tug "Dauntless," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of this Court, at the sum of Forty-five Thousand (45,000) Dollars, which appraisement has heretofore been approved by this court; and,

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Forty-five Thousand (45,000) Dollars, with interest thereon from the 9th day of

September, 1911, conditioned as required by law; and, [51]

WHEREAS, the parties hereto consent and agree and bind themselves, jointly and severally, in the sum of Forty-five Thousand (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipulator, shall pay the said sum of Forty-five Thousand (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this court, whenever the same shall be ordered by this Court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal and The American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto fully au-

thorized this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUG-BOAT COMPANY,

By W. J. GRAY,
Vice-president and Manager.

[Seal] Attest: J. W. CURRY,
Secty.

AMERICAN SURETY COMPANY OF NEW YORK,

By C. S. VAN BRUNDT,
Resident Vice-president. [Seal]

Attest: HAROLD M. PARSONS,
Resident Assistant Secretary. [52]

Taken and acknowledged before me, the undersigned, this 29th day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

United States of America,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath deposes and says:

That he is, and during all the times herein mentioned was, the resident Vice-president in the city of San Francisco, State of California, of The American Surety Company of New York; and that Harold M. Parsons is the resident assistant Secretary in said city and state of said company, and that they executed the foregoing and within stipulation for and on behalf of the said company; that said The

American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT.

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved this 30th day of March, 1912.

E. S. FARRINGTON,

Judge.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [53]

[Stipulation as to Steam Tug "Hercules."]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug

"Hercules," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said tug, leaving Astoria on September 9, 1911, all as set forth in said petition; and,

WHEREAS, the value of the interest of said petitioner in said steam tug "Hercules," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of this Court, at the sum of Seventy Thousand (70,000) Dollars, which appraisement has heretofore been approved by this Court; and,

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Seventy Thousand (70,000) Dollars, with interest thereon from the [54] 9th day of September, 1911, conditioned as required by law; and,

WHEREAS, the parties hereto consent and agree and bind themselves, jointly and severally, in the sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipu-

lator, shall pay the said sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this court, whenever the same shall be ordered by this Court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal, and The American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto duly authorized, this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY,

By W. J. GRAY,
Vice-president and Manager.

[Seal] Attest: J. W. CURRY,
Secty.

AMERICAN SURETY COMPANY OF NEW YORK,

By C. S. VAN BRUNDT,
Resident Vice-president.

[Seal] Attest: HAROLD M. PARSONS,
Resident Assistant Secretary. [55]

Taken and acknowledged before me this 29th day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

United States of American,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath deposes and says:

That he is, and during all the times herein mentioned was, the resident Vice-president in the City of San Francisco, State of California, of The American Surety Company of New York; and that Harold M. Parsons is the resident Assistant Secretary in said city and state of said company, and that they executed the foregoing and within stipulation for and on behalf of the said company; that said The American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT,

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

Approved this 30th day of March, 1912.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [56]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Order for Issuance of Monition, etc.

It appearing to this Court that Shipowners & Merchants' Tugboat Company, a corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that due appraisement, under oath of this Court, has been made by the Hon. James P. Brown, appraising the value of the interest of said petitioner in the Steam Tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective voyages mentioned in said petition; and,

It further appearing that the report of said Commissioner was filed with this court on the 23d day of March, 1912, and thereafter approved by this Court on the 29th day of March, 1912; and, [57]

It further appearing that stipulations, duly approved by this Court, have been filed herein on the 30th day of March, 1912, conditioned that the peti-

tioner herein will pay into this court whenever the same may be ordered either by this Court, or by the Appellate Court, in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said tugs "Dauntless" and "Hercules," as the same were immediately after the close of their respective voyages mentioned in said petition, together with interest thereon from the 9th day of September, 1911; and,

It further appearing that prayer is made in the petition herein for the issuance of a monition against the Hammond Lumber Company, and all other persons claiming damages of said petitioner, by reason of injuries to persons, or to property, occurring or arising upon the aforesaid voyages of said tugs "Dauntless" and "Hercules," or resulting from the loss, upon said voyages, of a raft of piling belonging to said Hammond Lumber Company, citing them, and each of them, to appear before this Court and there make due proof of their respective claims.

And the Court being fully advised in the premises:

NOW, THEREFORE, it is hereby ordered that a monition issue out of this court against all persons claiming damages by reason of injuries to persons, or to property, occuring or arising upon those certain voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, State of Oregon, on the 9th day of September, 1911, citing them to appear before James P. Brown, United States Commissioner, and make due proof of their respective claims, at or before a certain date to be named

in said writ, not less than three months [58] from the issuing of the same, and also citing them to appear and answer in said cause; and,

Be it further ordered that public notice of the issuance of said monition be given by publication in a daily newspaper, published in the City and County of San Francisco, State of California, once a week, until the return date fixed in said monition, which shall not be less than three months after the first publication thereof; and,

Be it further ordered that public notice of the issuance of said monition be also given in said cause, by the posting of copies of said monition in three public places in the City and County of San Francisco; and,

Be it further ordered that service of said monition be made upon Hammond Lumber Company, a corporation, by serving a copy thereof upon an officer of said corporation, at its office, No. 260 California Street, City of San Francisco, State of California.

Entered this 2d day of April, 1912.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed April 2, 1912. Jas. P. Brown, Clerk. M. T. Scott, Deputy Clerk. [59]

[Return of Marshal on Monition.]

United States of America,
Northern District of California.

San Francisco, April 13, 1912.

I hereby certify and return that I served the an-

nexed Monition on the Hammond Lumber Company, a corporation, at 260 California Street, San Francisco, by handing to and leaving an attested copy thereof with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, personally on the 2d day of April, A. D. 1912.

I further return that at the request of Messrs. Page, McCutchen, Knight and Olney, the proctors for the petitioners herein, I posted a certified copy of the annexed Monition in the following public places in the city of San Francisco, to wit, one at the Hall of Justice at Kearny and Washington Streets, one at the City Hall, located on the south side of Market Street, between Eighth and Ninth Streets, and one at the United States Postoffice and Courthouse building at Seventh and Mission Streets.

C. T. ELLIOTT,
U. S. Marshal.
By M. J. Fitzgerald,
Office Deputy. [60]

In the District Court of the United States for the Northern District of California.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Monition.

The President of the United States of America to the Marshal of the Northern District of California, Greeting:

WHEREAS, a libel and petition hath been filed in the District Court of the United States for the Northern District of California, on the 27th day of February, 1912, by the Shipowners & Merchants' Tugboat Company, praying for limitation of its liability concerning any and all loss, damage or injury, either to persons or to property, occurring or arising upon those certain voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911; and particularly praying for limitation of liability against any claim for loss or damage resulting from the loss, on said 9th day of September, 1911, of a raft of piling belonging to the Hammond Lumber Company, while being towed by said tugs "Dauntless" and "Hercules" upon said respective voyages, for the reasons and causes in said libel and petition mentioned, and praying a monition of said Court in that behalf to be issued, and that all persons claiming damage for any loss, damage or injury [61] occurring or arising upon said voyages, may be thereby cited to appear before said Court and make due proof of their respective claims, and all proceedings being had, if it shall appear that the petitioner is not liable for any such loss, damage or injury, that it may be so finally decreed by this Court; and,

WHEREAS, by order of this Court, the values of the interests of said petitioner in said steam tugs "Dauntless" and "Hercules" have been appraised at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars; and,

WHEREAS, pursuant to the requirements of said order, said petitioner has filed stipulations in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with good and sufficient surety, whereby said petitioner and said surety are obligated to pay said respective sums of money, or any part thereof, with interest thereon from the 9th day of September, 1911, into this court, whenever the same may be ordered; and,

WHEREAS, the said Court has ordered that a monition issue against all persons claiming damage for any loss, damage or injury occurring, or arising, upon said voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, on the 9th day of September, 1911, citing them to appear and make due proof of their respective claims;

NOW, THEREFORE, you are hereby commanded to cite all corporations, person or persons, claiming damages for any loss, damage or injury occurring, or arising, upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly to cite the Hammond Lumber Company, [62] a corporation, claiming damages for the loss of a raft of piling upon said voyages, to appear before said Court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner, at his office in the Post-office Building, on the corner of Mission and Seventh Streets, in the City of San Francisco, on or before the 10th day of July, 1912, at ten o'clock in the forenoon; and you are also commanded to cite such claim-

ants to appear and answer the allegations of the libel and petition herein on or before said last-named date, or within such further time as the Court may grant, and to have and receive such relief as may be due.

And what you have done in the premises, do you then make return to this Court, together with this Writ.

WITNESS the Honorable E. S. FARRINGTON, Judge of the United States District Court for the Northern District of California, this 2d day of April, 1912, and of our Independence the year one hundred and thirty-seven.

[Seal] JAS. P. BROWN,
Clerk.
By M. T. Scott,
Deputy Clerk.

[Endorsed]: Filed Apr. 3, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [63]

[Supplemental Return of Marshal on Monition.]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

MARSHAL'S SUPPLEMENTAL RETURN.

I HEREBY CERTIFY AND RETURN that, as

directed, by an order entered by the above-entitled court on the 30th day of March, 1912, and as commanded by the monition issued on the 2d day of April, 1912, under order and seal of said court, I cited all corporations and persons claiming damages for loss, damage or injury occurring or arising upon the voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, to appear before the above-entitled court, and make due proof of their respective claims before James P. Brown, United States Commissioner, at his office, in the Postoffice Building, on the corner of Seventh and Market Streets in the city of San Francisco, on or before the 10th day of July, 1912, at 10 o'clock in the forenoon, by giving public notice of said monition by posting certified copies thereof in three public places at the City and County of San Francisco, [64] State of California, to wit, one at the Hall of Justice at Kearny and Washington Streets; one at the City Hall located on the south side of Market Street between Eighth and Ninth Streets, and one at the United States Postoffice and Courthouse Building, at Seventh and Mission Streets; and by causing a copy of said monition to be published once a week from the 4th day of April, 1912, unto the 9th day of July, 1912, in the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted), in the City and County of San Francisco, State of California, as shown by the attached affidavit of the principal clerk of "The Recorder Printing & Publishing Company," printers and pub-

lishers of said newspaper, which affidavit of publication is hereby made a part of this return. I further certify that I particularly cited the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages of said steam tugs, by handing a certified copy of said monition to, and leaving the same with W. S. Burnett, Vice-president of the Hammond Lumber Company, at the office of said Company, to wit, No. 260 California Street, City of San Francisco, on the 2d day of April, 1912.

C. T. ELLIOTT,
U. S. Marshal.
By M. J. Fitzgerald,
Office Deputy. [65]

AFFIDAVIT OF PUBLICATION

in

THE "RECORDER."

In the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY.

State of California,
City and County of San Francisco,—ss.

E. C. Luchessa, of the said City and County, having been first duly sworn, deposes and says:

That he is, and at all times herein mentioned, was a citizen of the United States, over twenty-one years of age; and is competent to be a witness on the hearing of the matters mentioned in the annexed printed copy of Monition:

That he has no interest whatsoever in the matters mentioned therein; that is he, and at all times embraced in the publication herein mentioned was, the Principal Clerk of The Recorder Printing and Publishing Company, printers and publishers of the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted) in said City and County.

That deponent, as such Clerk, during all times mentioned in this affidavit has had, and still has, charge of all the advertisements in said newspaper.

That a Monition, of which the annexed is a true printed copy, was published in the above-named newspaper on the following dates, to wit: April 4th, 11th, 18th, and 25th, 1912; May 2nd, 9th, 16th, 23rd, 29th, and 31st, 1912; June 6th, 13th, 20th and 27th, 1912; and July 3rd, 5th, and 9th, 1912; [66] and further deponent sayeth not.

E. C. LUCHESSA.

Subscribed and sworn to before me this 9th day of July, 1912.

[Seal] CHARLES R. HOLTON,

Notary Public, in and for the City and County of San Francisco, State of California. [67]

MONITION.

In the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

The President of the United States of America, to the Marshal of the Northern District of California: Greeting:

Whereas, a libel and petition hath been filed in the District Court of the United States, for the Northern District of California, on the 27th day of February, 1912, by the Shipowners & Merchants' Tugboat Company, praying for limitation of its liability concerning any and all loss, damage or injury, either to persons or to property, occurring or arising upon those certain voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly praying for limitation of liability against any claim for loss or damage resulting from the loss, on said 9th day of September, 1911, of a raft of piling belonging to the Hammond Lumber Company, while being towed by said tugs "Dauntless" and "Hercules," upon said respective voyages, for the reasons and causes in said libel and petition mentioned, and praying a monition of said Court in that behalf to be is-

sued, and that all persons claiming damage, occurring or arising upon said voyages, may be thereby cited to appear [68] before said Court and make due proof of their respective claims, and all proceedings being had, if it shall appear that the petitioner is not liable for any such loss, damage or injury, that it may be so finally decreed by this Court; and,

Whereas, by order of this court, the values of the interests of said petitioner in said steam tugs "Dauntless" and "Hercules" have been appraised at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars; and,

Whereas pursuant to the requirements of said order, said petitioner has filed stipulations in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with good and sufficient surety, whereby said petitioner and said surety are obligated to pay said respective sums of money, or any part thereof, with interest thereon from the 9th day of September, 1911, into this court, whenever the same may be ordered; and,

Whereas the said court has ordered that a monition issue against all persons claiming damage for any loss, damage or injury occurring, or arising, upon said voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, on the 9th day of September, 1911, citing them to appear and make due proof of their respective claims.

Now, therefore, you are hereby commanded to cite all corporations, person or persons claiming damages for any loss, damage, or injury, occurring, or arising,

upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly to cite the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages to [69] appear before said court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner at his office in the Postoffice Building, on the corner of Mission and Seventh Streets, in the City of San Francisco, on or before the 10th day of July, 1912, at ten o'clock, in the forenoon; and you are also commanded to cite such claimants to appear and answer the allegations of the libel and petition herein on or before said last named date, or within such further time as the Court may grant, and to have and receive such relief as may be due.

And what you have done in the premises, do you then make return to this court, together with this writ.

WITNESS the Honorable E. S. FARRINGTON, Judge of the United States District Court, for the Northern District of California, this 2d day of April, 1912, and of our independence the year one hundred and thirty-seven.

[Seal] JAS. P. BROWN,
Clerk.
By M. T. Scott,
Deputy Clerk.

[Endorsed]: Filed Apr. 3, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner,
1107 Merchants Exchange Building, San Francisco, Cal.

Apr. 4–11–18–25:
May 2–9–16–23–29–31:
June 6–13–20–27:
July 3–5–9.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [70]

[Order Entering Default as to All Parties Except the Hammond Lumber Co.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Wednesday, the 10th day of July, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

#15,234.

In Re Petition of SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

The United States Marshal having returned upon the monition issued herein that "I hereby certify and return that I served the annexed monition on the

Hammond Lumber Company, a corporation, at 260 California Street, San Francisco, by handing to and leaving an attested copy thereof with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, personally, on the 2d day of April, A. D. 1912.

"I further return that at the request of Messrs. Page, McCutchen, Knight and Olney, the proctors for the petitioners herein, I posted a certified copy of the annexed monition in the following public places in the City and County of San Francisco, to wit, one at the Hall of Justice at Kearney and Washington Streets, one at the City Hall located on the south side of Market Streets between Eighth and Ninth Streets, and one at the United States Postoffice and Courthouse Building, at Seventh and *Market* Streets.

C. T. ELLIOTT,
U. S. Marshal.
By M. J. Fitzgerald,
Office Deputy."

On motion of Ira Campbell, Esqr., proctor for petitioner, proclamation was duly made for all persons claiming damages for any loss, damage or injury occuring or arising upon certain voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of [71] Astoria, Oregon, on the 9th day of September, 1911, and particularly any claim for damage or loss of a raft of pilings upon said voyage, to appear and answer the petition herein; no appearance being made, on motion of Ira Campbell, Esqr., by the Court ordered that the default of all parties be, and the same is hereby entered, except the Hammond

Lumber Company, a Corporation, which be, and it is hereby granted ten days in which to plead to said petition. [72]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Report of Commissioner as to Claims.

I, Jas. P. Brown, the undersigned, United States Commissioner, duly designated by this Court as the Commissioner before whom all claims in the above-entitled proceeding were ordered to be presented, *to* hereby CERTIFY that the time fixed in the monition issued pursuant to order of this Court, within which claims might be presented, expired on the 10th day of July, 1912, and that no claims of any character were filed with me on or before said 10th day of July, 1912, as by said monition required, and that on said day an order of default was entered against all persons not having presented their claims, as directed by said monition.

And I DO FURTHER CERTIFY that no request has been made of me to file any claims since said

order of default was entered.

Dated, July 11, 1912.

[Seal] JAS. P. BROWN,

United States Commissioner for the Northern District of California.

[Endorsed]: Filed Jul. 11, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [73]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Interlocutory Decree of Default.

It appearing to this Court that Shipowners & Merchants' Tugboat Company, a Corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that due appraisement, under order of this Court, has been made by the Hon. James P. Brown, appraising the value of the interest of said petitioner in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective

voyages mentioned in said petition; and,

It further appearing that the report of said commissioner was filed with this Court on the 23d day of March, 1912, and thereafter approved by this Court on the [74] 29th day of March, 1912; and,

It further appearing that stipulations, duly approved by this Court, have been filed herein on the 30th day of March, 1912, conditioned that the petitioner herein will pay into this court whenever the same may be ordered either by this Court, or by the Appellate Court, in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said steam tugs "Dauntless" and "Hercules," as the same were immediately after the close of their respective voyages mentioned in said petition, together with interest thereon from the 9th day of September, 1911; and,

It further appearing that thereafter on the 2d day of April, 1912, a monition issued under order and seal of this court, and that the marshal for the Northern District of California, as commanded by said monition, cited all corporations, person or persons claiming damages for any loss, damage or injury occurring or arising upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages, to appear before said Court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner, at his office in the Postoffice Building, on the

corner of Seventh and Mission Streets, in the City of San Francisco, on or before the 10th day of July, 1912, at 10 o'clock in the forenoon, by giving public notice of said monition, as ordered by this Court, by posting copies of said monition in three public [75] places in the City and County of San Francisco, State of California, and by serving a copy of said monition upon said Hammond Lumber Company, a corporation, at its office, No. 260 California Street, City of San Francisco, State of California; and, that further public notice of said monition was given pursuant to order of this Court by publishing in the "Recorder" a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted) in the City and County of San Francisco, State of California, a copy of said monition, once a week until the return day fixed in said monition, to wit, the 10th day of July, 1912; and,

It further appearing that on the return day of said monition, to wit, on the 10th day of July, 1912, at the hour of 10 o'clock in the forenoon, the crier of this court made proclamation for all corporations, person or persons claiming damages for any loss, damage, or injury occurring or arising upon the aforesaid voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly anyone claiming damages for the loss of a raft of piling upon said voyages, to come into court and make due proof of their said claims and answer the petition of the Shipowners & Merchants' Tugboat Company, petition herein, for limitation of liability,

under pain of being pronounced in contumacy and default and having said petition taken *pro confesso* against them; and,

It further appearing that no corporation, person or persons, other than the Hammond Lumber Company, appeared in response to said proclamation, and that thereupon, on [76] motion of proctors for petitioner, an order was entered pronouncing in default all corporations, person or persons, save and except the said Hammond Lumber Company, who might have any claim for loss, damage or injury occurring or arising upon the aforesaid voyages of said steam tugs "Dauntless" and "Hercules"; and,

It further appearing from the report of James P. Brown, Esq., the United States Commissioner named in said monition, that no claims have been filed with him as directed by said monition;

And the Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the default of all persons and corporations save and except the Hammond Lumber Company, having any claims against the Shipowners & Merchants' Tugboat Company, petitioner herein, or said steam tugs "Dauntless" or "Hercules," for any loss, damage or injury occurring or arising upon those certain voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on September 9, 1911, and particularly of all persons and corporations, save and except the Hammond Lumber Company, claiming damages for the loss of a raft of pil-

ing upon said voyages, be, and the same is, hereby entered.

Dated at San Francisco, this 12th day of July, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [77]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and HERCULES," for Limitation of Liability.

Exception to Petition.

Now comes the Hammond Lumber Company, a corporation, claimant herein, and, excepting to the petition of petitioner on file herein, avers:

I.

That the said petition fails to set forth facts sufficient to give this Court jurisdiction for adjudicating the limitation of liability for the acts your petitioner sets forth therein, and assigns the following particulars in which the said petition fails to set forth a cause of action:

1. Said petition fails to show that more than one person was damaged by reason of the acts set forth therein, or that there is more than one claim for dam-

age or injury or loss, arising from said acts, and hence the petition fails to show that there is any multiplicity of claims, demands, or interests which the pendency of the said litigation will prevent, or from which it will relieve the petitioner.

2. The said petition fails to show that the value of said tugs, or that the value of either of them, is less than the loss, damage, or injury done, suffered or incurred by reason of the acts described therein, and hence the said petition [78] fails to show that there is, or could be, any limitation of liability.

WHEREFORE claimant prays that the said petition for limitation of liability be dismissed, and that claimant have judgment for its costs herein.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Claimant.

Service admitted July 20, 1912.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner.

[Endorsed]: Filed Jul. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [79]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Claim of Hammond Lumber Company.

To the Honorable J. J. DE HAVEN, Judge of the United States District Court for the Northern District of California, and to James P. Brown, Esquire, United States Commissioner for the Said Court:

Now comes the Hammond Lumber Company, a corporation hereinafter called the claimant, and, without waiving its right to protest the jurisdiction of the said Court to entertain the said proceedings for limitation of liability, files its claim herein and alleges as follows:

I.

That claimant is now, and during all of the times herein mentioned was, a private corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and engaged in business and having an office at the City of Astoria, in Clatsop County, State of Oregon, and duly registered and licensed to do business under and by virtue of the laws of the State of Oregon; and is and during all of the times herein mentioned was engaged in the manufacture and sale of saw logs, spars, and products of the forest and in the construction of sea-going rafts containing piling, spars and saw logs. [80]

II.

That the petitioner is now and during all of the times herein mentioned was a private corporation, duly organized and existing under and by virtue of the laws of the State of California, and was and is engaged in the general towing business and in tow-

ing rafts from the port of Astoria, in Oregon, to the port of San Francisco, California, and was, during all the times herein mentioned, the owner of the steam tugboats "Dauntless" and "Hercules," each licensed to engage in and engaged in the general towage business and coastwise trade, in the United States, and Pacific Ocean, and also engaged in the general business of towing rafts of piling, spars and saw logs from the Columbia River to points in California.

III.

That on or about the 9th day of November, 1911, claimant did file its complaint against the petitioner in the Circuit Court of the State of Oregon for Clatsop County, in that certain suit entitled: "In the Circuit Court of the State of Oregon for Clatsop County, Hammond Lumber Company (a Corporation), Plaintiff, vs. Shipowners and Merchants Tugboat Company (a Corporation), Defendant"; and that thereafter and prior to the filing of the stipulation herein for the value of the "Dauntless" and of the "Hercules," claimant did file in the said suit its Amended Complaint, and served the same upon petitioner, and the petitioner did file its answer to said Amended Complaint, joining issue within the allegations of the said Amended Complaint; and that said cause did then stand at issue and ready for trial, and does now so stand at issue and ready for trial; that the cause of action set forth and described in the said Amended Complaint filed in the said suit in the State of Oregon is in all respects the same as that set forth in [81] this claim; that this is the only

claim filed in this proceeding; that this claim is for a sum less than the value of the tugs "Dauntless" and "Hercules" and the sum stipulated to be paid in lieu of their surrender in the stipulation for value of the said vessels and their freight pending, heretofore filed herein.

IV.

That on the 30th day of August, 1911, the claimant and petitioner entered into a contract wherein and whereby the petitioner agreed to and with the claimant, in consideration of the sum of $2,250 to be paid to the petitioner by claimant upon the completion of the towage hereinafter described, to safely tow for the claimant a large raft of piling and spars from Flavel in the port of Astoria, in Oregon, to the port of San Francisco, in the State of California, and thereupon and pursuant thereto this claimant constructed in a first-class manner a large raft of piling and spars and completed the same on or about the 8th day of September, 1911, and bound the same together with *a* large and heavy chains, wire rope cables and other appliances.

That said raft when completed on said date and at the time it became a total loss as hereinafter stated, contained 592–499 lineal feet of piling and spars, and the piling and spars in said raft were of the reasonable value of $59,249.90. That said raft as completed, including the piling and spars and chains, wire cable, shackles, turn buckles, and equipment, was at said times of the full and reasonable value of $71,249.90. **[82]**

V.

That thereafter and on the 9th day of September, 1911, pursuant to said contract aforesaid so entered into between claimant and petitioner, the claimant delivered said raft so constructed and equipped ready for sea to the petitioner at Flavel in the port of Astoria to be by the petitioner towed from said port to the port of San Francisco, in the State of California, and there delivered to claimant; and the said petitioner there and on that date received and took into its possession the said raft so constructed as aforesaid, and pursuant to said contract aforesaid, undertook to safely tow the same from said port of Astoria in Oregon to the port of San Francisco, in the State of California, and there deliver same to claimant. That in order to tow the same the said petitioner used and employed the said steam tug "Dauntless" and the said steam tug "Hercules" each of which was equipped with a towing machine. That petitioner fastened the said "Dauntless" to said raft with a long towing cable, one end of which was wound around the drum of the towing machine on said "Dauntless" and the other end fastened to said raft, and the said "Hercules" was fastened to the "Dauntless," which a long towing cable leading through the forward bits of the "Dauntless" to the towing machine of the "Hercules," being thus equipped, said two tugs started to sea with said raft on said date aforesaid; but the said petitioner so negligently and carelessly conducted itself that the said raft was entirely lost, destroyed and became a total loss to the claimant, for that at the time said

raft was delivered to the said petitioner, as aforesaid, and at the time petitioner received the same and started to tow the same to the port of San Francisco, under said contract aforesaid, the [83] weather and conditions on the Columbia River, Ocean and Columbia River bar were favorable, but there was, as usual at the then stage of the tide, of which the servants and officers of petitioner in charge of the said tugs had actual notice, a northward drift of the current in the waters of the said Columbia River, and at the mouth thereof, and in the said ocean, towards, over and across a large spit on the northerly edge of the channel of said river at the mouth thereof, called and generally known as "Peacock Spit," a dangerous spit near the mouth of said river, where the waters of the river and ocean meet and which, if struck by said raft, or if such raft should come in contact therewith, or be grounded thereon, would become a wreck and total loss, all of which was well known to the petitioner, its servants, masters and officers in charge of said tugboats, and all of which dangers could have been easily and readily avoided by taking the southerly side of such channel, but the said petitioner, through its servants, masters and officers in charge of said tugs, carelessly and negligently failed and neglected to, and did not, tow said raft by the southerly course through said channel, as aforesaid, but carelessly and negligently attempted to tow the same along the northerly side of said channel, and over and against the said Peacock Spit, and carelessly and negligently towed said raft so close to said spit that they

lost control thereof, and the same broke away from said tugs and drifted upon said spit, and the same became and was broken, and a total loss.

That at the time the said tug "Dauntless" and the said tug "Hercules" took said raft in tow, the towing machinery and appliances and the machinery and the appliances on the said tug "Dauntless," to which was fastened the tow-line leading from [84] the said tug "Dauntless" to said raft, and with which said tow-line was manipulated, and with which said raft was towed, and which was compelled to resist the combined strain of the power of the "Hercules," as well, was and continued to be thereafter, old, and worn, and useless, and defective, and out of repair, and of insufficient size, capacity and strength, and the brake and brakes thereof were out of repair and were also incapable of holding, and of insufficient strength to hold and tow said raft, with the said combined strain of said two tugs, and the said towing machinery and appliances on such tug "Dauntless" were, and each was, of insufficient strength to hold and tow said raft, and particularly to hold and tow the same with such combined power and strain through the said northerly channel, and while said raft was in tow of said tug "Hercules" and said tug "Dauntless," and in the waters of the said Columbia River and near the said Peacock Spit aforesaid, and in said north channel aforesaid, by reason of said insufficient towing machinery and appliances, and brake and brakes aforesaid, and by reason of the fact that the towing machinery and appliances to which were fastened to tow-line lead-

ing from said raft aforesaid was of insufficient strength and power to hold and tow said raft, with such combined strain of said two tugs, and because of the fact that the said tow-line leading from said raft and by which it was towed was not fastened to the said towing machinery on said tug "Dauntless," the said tow-line paid out and slipped loose from, and became wholly detached from said towing machinery and from said tug "Dauntless," aforesaid, and thereupon said raft drifted over and upon and against said Peacock Spit, where it became wrecked and a total loss to plaintiff. [85]

The claimant further avers, that at and during all the times herein mentioned, the said channel of said river, and the channel over the bar and into the said ocean, was fully one mile in width, and of sufficient depth to successfully and safely and securely tow said raft through the same to the sea. That the waters of said channel gradually shallowed near said Peacock Spit, at and around which the waters are at all times very rough, and a heavy sea at all times prevails there, all of which was well known to petitioner at and during all the times herein mentioned.

That the said petitioner by and through its said masters and officers and navigators of said two steam tugs aforesaid carelessly and recklessly towed said raft too close to said Peacock Spit, and into shallow water where said raft could not be successfully managed, and in great danger of destruction, although at said time there was sufficient water in the channel of such river to safely tow said raft as aforesaid. That in making such tow as aforesaid, said peti-

tioner through its said officers and agents and masters of said two tugboats, failed to and did not exercise maritime skill, in that said two tugboats were unskillfully and carelessly maneuvered, the leading tug not keeping in line, so that the power thereof was not permitted to be transferred to said raft, and the tow-lines on each tug were neither looked after or watched or cared for, but were permitted by the unskillful maneuvering of said two tugboats, and failure to watch same, to become at times slackened, and then the full power of each tug with the added velocity of their speed thrown against the same, and such lines tightened whereby the towing machinery of each was subjected to a great and unnecessary strain, [86] and the raft having an unequal tow, was not at all times under control as it should have been by the exercise of ordinary maritime skill. That the towing machine on each tug was operated by steam, and required a steady high pressure of steam to successfully operate the same, but such steam pressure was permitted to run down, whereby said towing machine could not be skillfully or properly manipulated. That in order to safely tow said raft with the combined power and strain of both the said tugs, it was necessary that the tow-line running from the said raft to the said "Dauntless" should have been safely and securely fastened to the towing machine by securely fastening the end of such tow-line to the flange of the drum on the towing machine thereon, and winding such tow-line around such drum a sufficient number of times to maintain and keep the same securely fastened thereto and pre-

vent the same from slipping off, but by reason of the carelessness and negligence of the said petitioner, such tow-line was not safely, nor was it securely fastened to the flange of the said drum and wound around the same a sufficient number of times to keep the same from slipping off therefrom, but in spite of the combined strain of both the said tugs, was carelessly and negligently permitted to remain wholly unsecured, and allowed to pay out until wholly unwound from such drum, and held in such a manner that when the strain of the two tugs was placed on such raft, it would slip off and become wholly loosened and detached therefrom, and the said raft thereby set adrift.

That while said petitioner, through its officers and masters of said two tugboats aforesaid, were towing the said raft through the said northerly channel, and while said raft was by reason of their carelessness and unskillfulness towed too [87] closely to said Peacock Spit and into the shallow water, and by reason of the carelessness and negligence of the petitioner and its servants and employees and the navigators of the tugboat "Hercules" and said tugboat "Dauntless" and the unskillful maneuvering in combination of said tugboat "Hercules" and said tugboat "Dauntless" aforesaid, and by reason of the fact that the tow-line on said tugboat "Hercules" and the tow-line on said tugboat "Dauntless" were each improperly maneuvered and handled and allowed to become slackened and then abruptly tightened and were not cared for, or watched, and by reason of the manner in which each of said tugboats

was maneuvered, and because of the fact of insufficient steam for operating the said towing machinery on each of said tugboats, and because of the fact that the said tow-line running from said raft and fastened to the towing machinery on said tug "Dauntless" was not securely or safely fastened to resist the combined strain of the two tugs, and was permitted to unwind therefrom, and that no watch was placed thereon, or care was paid thereto, the said tow-line leading from said raft to the towing machinery in the said tug "Dauntless" paid out and slipped loose from and became wholly detached from said towing machinery and from said tug "Dauntless," and thereupon the said raft drifted over and upon and against said Peacock Spit aforesaid and was broken up and became a total loss to the claimant herein.

That after said tow-line had become released from said tugs, and after said officers and servants of petitioner in charge of said two tugs had turned same loose, and after same had become loose, said petitioner and its servants, masters and officers in charge of said tugboats had ample time *and* [88] and opportunity to secure said raft and tow same safely to said port of San Francisco, but carelessly and negligently refused to and did not do so, but abandoned the same and the same became lost as aforesaid.

This claimant therefore avers that by reason of the failure of the petitioner to perform its said contract to safely tow said raft from the port of Astoria, in Oregon, to the port of San Francisco, in the State

of California, and the loss of said raft in the manner as aforesaid, this claimant became and was damaged in the full sum of Seventy-one Thousand Two Hundred and Forty-nine Dollars and Ninety Cents ($71,249.90), no part of which has been paid, and the whole thereof is now due, owing and unpaid.

WHEREFORE, claimant prays that the said petition for limitation of liability be dismissed, and that if the same be not dismissed, the claimant in any event be hence dismissed with full right to continue the said suit in the State of Oregon, and that if the Court compel claimant to allege its special cause of action in this suit, the Court to decree the petitioner to be liable to claimant in the sum of Seventy-one *though,* Two Hundred Forty-nine Dollars and Ninety Cents ($71,249.90), with interest and costs.

W. I. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Claimant. [89]

United States of America,
State of California,
City and County of San Francisco,—ss.

L. C. Stewart, being first duly sworn, deposes and says: That he is the Assistant Treasurer of the claimant herein, the Hammond Lumber Company, a corporation, and as such is authorized to make, verify and file the claim hereon on behalf of the said company; that he has read the foregoing claim, knows the contents thereof, and that the allegations of the same are, and each thereof is, to the best of his knowl-

edge, information and belief, true, as stated herein, and there set forth.

L. C. STEWART.

Subscribed and sworn to before me this 24th day of July, 1912.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [90]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Answer of Hammond Lumber Company to Petition for Limitation of Liability.

To the Honorable J. J. DE HAVEN, Judge of the United States District Court for the Northern District of California, Sitting in Admiralty:

The answer of the Hammond Lumber Company to the petition of the Shipowners & Merchants' Tugboat Company for limitation of liability, respectfully denies, admits and alleges as follows:

I.

Admits the allegations of article I of said petition.

II.

Admits the allegations of article II of said petition.

III.

Admits the allegations of article III of said petition.

IV.

Admits the allegations of article IV of said petition.

V.

Admits the allegations of the first paragraph of [91] article V of said petition; denies that at the time the said tugs started upon the said tow, the weather, sea and tidal conditions, or any of them, were favorable to a successful towing of the said raft across the said bar upon the route and across the place chosen by the said tugs across the said bar; denies that in making the said tow the said tugs kept in the usual channel down the said river taken by vessels of the draft and tonnage of said log raft; and denies that they passed the usual, and a safe, distance, or either of them, to the northward of the buoys marking the southerly side of the said channel at the entrance to the said river; denies that about the time the said raft was struck the tide began to ebb strong and the sea at the entrance began to make; denies that by reason of said sea and tide, or either of them, said raft became unmanageable and, in that behalf, alleges that if the said raft became unmanageable it became so by reason of choice and of an improper place in said channel, at which there existed a northerly current set across the said channel towards the breakers

off said Peacock Spit; admits that after the said log raft had been taken into the said wrong place in the said channel for crossing the said bar, and because of the same, despite every effort of the said tugs, said raft was gradually turned and swept broadside against said sea until the after end of said raft tailed off toward the breakers on Peacock Spit; admits that the said tugs continued pulling on said raft until the towing hawser pulled off the towing machine; and alleges that it is ignorant as to whether the raft had passed the black buoy marking the northerly side of said channel off Peacock Spit, wherefore it calls for proof of the same, if the same be pertinent; denies that suddenly and without warning, or either of them, said raft pulled the towing hawser off the [92] towing machine on the said tug "Dauntless," and in that behalf alleges that petitioner knew, or should have known, that the towing machine on the said tug "Dauntless" was not strong enough to stand the combined strain of the power of the engines of the tug "Dauntless," in addition to the power of the engines of the tug "Hercules," pulling against the weight of the said log raft; denies that the said log raft pulled the said towing hawser off the said towing machine on the tug "Dauntless," and in that behalf alleges that said raft had no motive power thereon of any kind whatsoever, and that the only motive power pulling the said towing line away from the said tug "Dauntless" was the combined motive power of said tugs "Dauntless" and "Hercules," and that by reason thereof the said towing hawser was pulled off said towing machine and the said log raft driven into the

breakers off of Peacock Spit, and did become a total loss.

VI.

Admits the allegations of article VI of said petition.

VII.

Alleges that it is ignorant of the allegations of article VII, other than the allegation regarding the towing machines of said tugs, wherefore it calls for proof of all of the said allegations, if the same be pertinent; but as to the allegations concerning the towing machines, claimant denies that the said tugs were good, staunch, able and seaworthy vessels, and fully and properly equipped and supplied with towing machines in good order and condition and sufficient for the towing of said raft of piling, as described in the said petition, on said voyage, and in that behalf alleges that the towing machine on the tug "Dauntless" was not strong enough, nor suitable, to withstand [93] the combined strain of the engines of the "Dauntless" and the "Hercules" towing on the said bar, against the weight and draft, and the inertia of the said raft of piling.

VIII.

Denies that the loss of the said raft of piling and all other damages and injuries, whether of persons or of property, done, occasioned and incurred upon said voyage of the said tug "Dauntless" or the said tug "Hercules," or any of them, were done, occasioned and incurred, or any of them without the consent, or privity, or knowledge, or design, or neglect of the petitioner, herein, or any of its directors, or officers,

or servants, or of either of said tugs, and in that behalf alleges that the loss of said raft of piling was occasioned by the neglect of the petitioner herein and of its officers, servants and said tugs.

IX.

That on or about the 9th day of November, 1911, claimant did file its complaint against the petitioner in the Circuit Court of the State of Oregon, for Clatsop County, in that certain suit at common law entitled: "In the Circuit Court of the State of Oregon for Clatsop County. Hammond Lumber Company (a Corporation), Plaintiff, vs. Shipowners and Merchants' Tugboat Company (a Corporation), Defendant"; and that thereafter and prior to the filing of the stipulation herein for the value of the "Dauntless" and of the "Hercules," claimant did file in the said suit its Amended Complaint, and served the same upon petitioner, and the petitioner did file therein its Answer to said Amended Complaint, joining issue with the allegations of the said Amended Complaint; and that said cause did then stand at issue and ready for trial, and does now so stand at issue and ready for trial; that the cause of action set forth and described in the said Amended Complaint [94] filed in the said suit in the State of Oregon is in all respects the same as that set forth in the claim of this claimant on file herein; that said claim is the only claim filed in this proceeding; that said claim is for a sum less than the value of the tugs "Dauntless" and "Hercules" and the sum stipulated to be paid in lieu of their surrender in the stipulation for value of the

said vessels and their freight pending, heretofore filed herein.

V.

Answering article X, claimant denies that the loss of the said raft was solely caused by the breaking away of said raft from the said tug "Dauntless" and was not caused by, nor contributed to by any act or thing done, occasioned or incurred by said tug "Hercules" and that the cause of the loss of the said raft was not participated in by said tug, and denies each and every the said allegations, and in that behalf alleges that it appears herein, and that it is a fact, that the said tug "Hercules" was pulling upon the said tug "Dauntless" at the time that they broke away from the said raft, and that the power of the said tug "Hercules" so applied through the said tug "Dauntless" necessarily contributed to the force which caused the said raft to break away, and further that it appears that the said tug "Hercules" being in the lead of the said tandem of tugs, necessarily participated in choosing the path through which the said combination of tugs and tow passed.

WHEREFORE, your claimant prays that petitioner take nothing by its petition on file herein, and that the same be dismissed, and that claimant be permitted to pursue its said suit in the said State of Oregon, and further prays that in the event this Court hold that it has jurisdiction of the said petition for limitation, that it deny the said limitation; and [95] claimant further prays for its costs herein, and

for such other relief as may to the Court seem meet.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Claimant.

United States of America,
State of California,
City and County of San Francisco,—ss.

L. C. Stewart, being first duly sworn, deposes and says: That he is the Assistant Treasurer of the claimant herein, the Hammond Lumber Company, a corporation, and as such is authorized to make, verify and file the claim herein on behalf of the said company; that he has read the foregoing answer, knows the contents thereof, and that the allegations of the same are, and each thereof is, to the best of his knowledge, information and belief, true, as stated therein, and there set forth.

L. C. STEWART.

Subscribed and sworn to before me this 24th day of July, 1912.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California. [96]

Service admitted July 30, 1912.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner.

[Endorsed]: Filed Jul. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [97]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Objections and Answer of Petitioner to Claim of Hammond Lumber Company.

To the Honorable JOHN J. DE HAVEN, Judge of the United States District Court, for the Northern District of California, and to James P. Brown, Esquire, United States Commissioner for the Said Court:

Comes now the Shipowners & Merchants' Tugboat Company, petitioner herein, and objects to the allowance of the claim of the Hammond Lumber Company heretofore filed herein and presented to the Honorable James P. Brown, United States Commissioner for said Court, pursuant to the monition issued therein.

And in answer to the allegations of said claim, petitioner admits, denies and alleges as follows:

I.

Petitioner admits the allegations of paragraph I of said claim.

II.

Petitioner admits the allegations of paragraph II of said claim. [98]

III.

Answering unto the allegations of paragraph III of said claim, claimant admits that on or about the 10th day of November, 1911, claimant filed its complaint against the petitioner in the Circuit Court for the State of Oregon for Clatsop County, in that certain suit entitled In the Circuit Court of the State of Oregon for Clatsop County, Hammond Lumber Company, a Corporation, Plaintiff, vs. Shipowners & Merchants' Tugboat Company, a Corporation, Defendant, and admits that thereafter and prior to the filing of the stipulation herein for the value of the "Dauntless" and for the "Hercules," claimant filed in said suit its amended complaint, and served the same upon petitioner; and admits that petitioner filed its answer to said amended complaint, joining issue with the allegations thereof; and admits that said cause then stood at issue and ready for trial, and that the same now stands at issue and ready for trial so far as the pleadings are concerned; but denies that the cause of action set forth and described in said amended complaint filed in said suit in the State of Oregon is in all respects as that set forth in the claim herein, except that it admits that in said suit commenced in the State of Oregon, judgment is sought for the value of a raft of piling and its fittings in the same amount as prayed for in this claim. Petitioner admits the claim herein is for a sum less than the value of the tugs "Dauntless" and "Hercules" and the sum stipulated to be paid in lieu of their surrender in the stipulation for value of said vessels, and their freight pending, heretofore filed in this pro-

ceeding; but denies that the claim herein is for a sum less than the [99] value of either of said tugs taken separately, and in that behalf alleges that the petition filed herein prays that this Court may be pleased to determine that no liability exists on the part of petitioner for any act or thing done or occasioned by the tug "Hercules" upon the voyage upon which said raft was lost, and further prays that in case it shall be found that any liability exists on the part of your petitioner for the loss of said raft, that such liability shall in no event be permitted to exceed the value of the tug "Dauntless," which value is less than the amount of the claim herein.

IV.

Answering unto the allegations of paragraph IV of said claim petitioner admits that on or about the 30th day of August, 1911, claimant and petitioner entered into a contract wherein and whereby defendant agreed to and with this claimant in consideration of the sum of $2,250 to be paid petitioner by claimant upon the completion of the towage thereinafter in said paragraph described, to tow for plaintiff, a large raft of piling and spars from Flavel in the port of Astoria, Oregon, to the port of San Francisco, in the State of California; but denies that petitioner on or about said 30th day of August, 1911, or at any other time, agreed with claimant in consideration of the sum of $2,250, or any other sum, to safely tow for claimant a raft of piling and spars, or of any other kind of material, from Flavel in the port of Astoria, or from any other port, to the port of San Francisco, in the State of California, or to any other place.

Petitioner denies that thereupon, and pursuant to said contract, claimant constructed in a first-class manner a large raft of piling and [100] spars, and completed the same on or about the 8th day of September, 1911, and bound the same together with a large and heavy chains, wire rope cables and other appliances, but in that behalf admits that upon the arrival of its tug "Dauntless" at the port of Astoria, on or about the 9th day of September, 1911, there was delivered to it by claimant, a raft of piling and of spars bound together, so far as the master of said tug could determine, with large and heavy chains, wire rope cables and other appliances.

Petitioner is ignorant as to whether said raft, when completed on said date, or whenever the same was completed, and at the time it became a total loss, contained 592,499 lineal feet of piling and spars, and as to whether the piling and spars in said raft were of the reasonable value of $59,249.90, and, therefore, demands that strict proof of the same be made. Petitioner is ignorant as to whether said raft as completed, including the piling and spars, and chains, wire cables, shackles, turn buckles, and equipment, was at the times therein alleged in said claim, or at any other time, of the full and reasonable value of $71,249.90, and, therefore, demands that strict proof of the same be made.

V.

Answering unto the allegations of paragraph V of said claim, petitioner admits that on the 9th day of September, 1911, pursuant to the contract heretofore admitted in paragraph IV of this answer, and in pur-

suance to no other contract, claimant delivered said raft constructed and equipped ready for sea, so far as the master of its tug "Dauntless" could determine, to petitioner at Flavel in the port of Astoria to be by petitioner towed by its [101] tug "Dauntless" from said port to the port of San Francisco, in the State of California, and there delivered to claimant, provided that the said raft arrived at the port of San Francisco, in the State of California; and in that behalf alleges that said raft was to be towed subject to the perils of the sea incident to such towage; and denies that there was any absolute contract to make delivery of said raft. Petitioner admits that it received and took said raft into its possession on the aforementioned date and, pursuant to the contract in this answer admitted, but to no other contract, undertook to tow the same from the port of Astoria, to Oregon, to the port to San Francisco, in the State of California, and there deliver the same to claimant; but denies that it took said raft into its possession, and undertook to safely tow the same from said port of Astoria, to the port of San Francisco, or to deliver said raft in all events to claimant; and in that behalf alleges that the same was to be towed and delivered subject to the exigencies and perils of the sea incident to such towage. Claimant denies that in order to tow said raft, petitioner used and employed its said steam tug "Dauntless" and its said steam tug "Hercules" but admits that each was equipped with a towing machine; and in that behalf alleges that the master of said tug "Dauntless" was unable to procure the services of a bar tug to assist him with said

raft out of the Columbia River, and across the bar at the entrance thereof, and thereupon called to his assistance the tug "Hercules," which then happened to be in the port of Astoria, for the purpose of towing a similar raft to a port in the State of California. Petitioner admits that the said tug "Dauntless" [102] fastened to said raft with a long towing cable, one end of which was wound around the drum of the towing machine on said "Dauntless," and the other end fastened to said raft by means of a long heavy chain bridle; and admits that said tug "Hercules" was fastened to the "Dauntless" with a long towing cable, leading through the forward bits of the "Dauntless" to the towing machine of the "Hercules"; and admits that the two tugs being thus equipped, started to sea with said raft on said date; but denies that petitioner, or said tugs, or either of them, negligently and carelessly conducted itself, or themselves, so that said raft was entirely lost, destroyed and became a total loss to claimant; but admits that said raft became lost and destroyed and a total loss to claimant; and in that behalf alleges that said raft became lost because for reasons unknown to petitioner, said raft stuck while being towed through the channel at the mouth of the Columbia River; that while being so held up, the tide began to ebb strongly, and the sea at the entrance to make, until a tremendous sea was running in across the bar and up the entrance against the increasing ebb tide, and that by reason of said sea and tide, said raft became unmanageable and despite every effort of said tugs was gradually turned and swept broadside

against said sea until the after end of said raft tailed off toward the breakers on "Peacock Spit" where, by reason of said sea and said breakers, said raft finally became lost.

Petitioner admits that at the time it received said raft, and started to tow the same to the port of San Francisco, under the contract hereinbefore admitted, [103] but under no other contract, the weather and conditions on the Columbia River, ocean, and Columbia River bar were favorable; and admits that there was a northward drift of the current in the waters of the Columbia River at the mouth thereof, and in said ocean and across said bar, which said current drifted towards, over and across a large spit on the northerly edge of the channel of said river at the mouth thereof, called and generally known as "Peacock Spit"; and admits that said spit was a dangerous spit near the mouth of said river, and admits that if struck by said raft, or if said raft should come in contact with said spit, or be grounded therein, it would very likely become a wreck, and total loss. Petitioner admits that said facts were known to it, its servants, masters and officers in charge of said tugs; but petitioner denies that the northward drift of said current was usual at the then stage of the tide. Petitioner denies that all of the dangers previously mentioned in said paragraph could have been easily and readily avoided by taking the southerly side of said channel; and denies that it through its servants, masters and officers in charge of said tugs, or in any other manner, carelessly and negligently failed and neglected to, and did not tow said raft by the south-

erly course through said channel, either as aforesaid or otherwise; and denies that it carelessly and negligently attempted to tow said raft along the northerly side of said channel, and over and against the said "Peacock Spit"; and denies that it carelessly and negligently towed said raft so close to said spit that they lost control thereof but admits that said raft broke away from said tugs and drifted upon said spit, and [104] the same became and was a total loss. In that behalf petitioner alleges that in making said tow, said tugs kept in the usual channel down said river taken by vessels proceeding to sea, passing the usual and the safe distance off to the north of the buoys marking the southerly side of said channel at the entrance to said river, and alleges that as it reached channel buoy 4, said raft stuck, and that said tugs were unable to make any headway with it, and that at about the time said raft so stuck, the tide began to ebb strongly, and the sea at the entrance began to make, until a tremendous sea was running in across the bar and up the entrance against the increasing ebb tide, and that by reason of said sea and tide, said raft became unmanageable, and, despite every effort of said tugs, was gradually turned and swept broadside against said sea until the after end of said raft tailed off into the breakers on "Peacock Spit"; and alleges that said tugs continued pulling upon said raft until after it passed the black buoy marking the north side of said channel off "Peacock Spit," when suddenly, and without warning, said raft pulled the towing hawser off the towing machine on the tug "Dauntless," and upon being so

freed, drifted further into the breakers on "Peacock Spit," and became a total loss.

Petitioner denies that at the time said tug "Dauntless" and said "Hercules" took said raft in tow, the towing machine and appliances, and the machine and appliances of the said tug "Dauntless" to which was fastened the towing line leading from the said tug "Dauntless" to the said raft, and with which said tow-line was manipulated, and with which said raft was towed and which was compelled to resist the combined strain of the power of the "Hercules" **[105]** as well, was, or continued to be thereafter, old, or worn, or useless, or defective, or out of repair, or of insufficient size, or capacity, or strength, and denies that the brake, or brakes, thereof were out of repair, or were incapable of holding, and denies that they were of insufficient strength to hold and tow said raft with the combined strain of said tugs, and denies that said towing machinery and appliances on said tug "Dauntless," were, or each of them was, of insufficient strength to hold and tow said raft; and denies that they were of insufficient strength to hold and tow the same with such combined power and strain through said northerly channel; and in that behalf further denies that said raft was towed through said northerly channel, as alleged in said claim; and petitioner further denies that while said raft was in tow of said tug "Hercules" and said tug "Dauntless," and in the waters of said Columbia River, and near said "Peacock Spit," and in said north channel, that the tow-line payed out and slipped loose from, or became wholly detached from said towing machinery,

and from said tug "Dauntless" by reason of any insufficiency of the towing machinery and appliances, or brake, or brakes; and denies that while said raft was in tow of said tugs in said vicinity alleged as aforesaid, that said tow-line payed out and slipped loose from, or became wholly detached from, said towing machinery, and from said tug "Dauntless" by reason of the towing machinery and appliances to which was fastened the tow-line leading from said raft being of insufficient strength and power to hold and tow said raft with such combined strain of said two tugs; and denies that while said raft was in tow of said two tugs in the [106] vicinity alleged in said claim, that said tow-line payed out and slipped loose from, and became wholly detached from, the said towing machinery and from said tug "Dauntless" because of the tow-line leading from said raft, and by which it was towed, not being fastened to said towing machinery on said tug "Dauntless"; and petitioner further denies that said raft drifted over, and upon, and against said "Peacock Spit" by reason of any of the causes hereinbefore mentioned, and particularly that it did not drift over, or upon, or against said "Peacock Spit" by reason of any insufficiency of the towing machinery and appliances, or brake, or brakes, or by reason of the towing machinery being of insufficient strength and power to hold and tow said raft with the combined strain of said two tugs, or because the tow-line leading from said raft, and by which it was towed, was not fastened to the towing machinery on said tug "Dauntless"; but petitioner does admit that said raft became wrecked, and a total

loss to claimant, except that it denies that it became wrecked, and a total loss to claimant by reason of any of the causes alleged in said claim.

Petitioner further denies that the towing machinery and appliances, or brake, or brakes, were insufficient; and denies that the towing machinery and appliances to which was fastened the tow-line leading from said raft was of insufficient strength and power to hold and tow said raft, with such combined strain of said two tugs; and denies that the tow-line leading from said raft, and by which it was towed, was not fastened to said towing machinery on said tug "Dauntless"; and denies that the tow-line payed out and slipped loose from said towing machinery and from said tug [107] "Dauntless"; and denies that by reason of any of said alleged facts that said raft drifted over, and upon, and against said "Peacock Spit"; and in that behalf petitioner alleges that said towing machinery and appliances were in a seaworthy condition, and of sufficient strength and power to hold and tow said raft, with the combined strength of said two tugs, and alleges that said tow-line was properly fastened to the towing machinery of said tug "Dauntless," and alleges that the same was torn loose from the drum on the towing machinery of said tug "Dauntless" because of the strain resulting from said raft getting into the breakers and grounding on said "Peacock Spit"; and alleges that by reason thereof said raft drifted further over, and upon said "Peacock Spit" where it became wrecked and a total loss to claimant.

Petitioner denies that at, and during all the times,

herein mentioned the said channel over the bar and into said ocean at all points and places, was one mile in width; and denies that it was of sufficient depth to successfully, safely and securely tow said raft through the same to sea, and in that behalf alleges that said raft grounded and stuck while the same was being towed through the original channel taken by vessels proceeding to sea. Petitioner admits that the waters of said channel gradually shallowed near said "Peacock Spit," and admits that at, and around, said "Peacock Spit" the waters are at all times rough when there is any sea rolling in from the ocean, and admits that a heavy sea generally prevails there; but denies that the waters around said spit, are, at all times, very rough, and denies that a heavy sea, [108] at all times, prevails there; and denies that said conditions were well known to petitioner at, and during all, the times in said claim mentioned, except that it admits that it had knowledge of the conditions which generally prevailed on said spit.

Petitioner denies that it, by and through its said masters, officers and navigators of said two steam tugs, or through any other persons, or in any other manner, carelessly and recklessly towed said raft too close to said "Peacock Spit" and into shallow water where said raft could not be successfully managed; and denies that it carelessly and recklessly, or in any other manner, towed said raft where it was in great danger of destruction; and denies that at said time there was sufficient water in the channel of said river to safely tow said raft, for, in that behalf, it alleges that said raft stuck while being towed through the

channel of said river. Petitioner denies that in making said tow, it, through its officers, and agents and masters of said two tugs, or through any other persons, or in any way, failed to, and did not exercise maritime skill; and denies that said two tugs were unskillfully or carelessly maneuvered; and denies that the leading tug did not keep in line so that the power thereof was not permitted to be transferred to said raft; and denies that the tow-lines on each tug were neither looked after, or watched, or cared for; and denies that the tow-lines on each tug were permitted by unskillful maneuvering of said two tugs, or failure to watch the same, to become at times slackened; and denies that while said lines were allowed to become slackened, the full power of each tug with the added velocity of their speed was thrown [109] against the same; and denies that said lines were tightened in any such manner whereby the towing machinery of each was subjected to great and unnecessary strain; and denies that the towing machinery of each was subjected to great and unnecessary strain by *and* such maneuvers on the part of said tugs as alleged in said claim; and denies that the raft having an equal tow was not at all times in control as it should have been by the exercise of ordinary maritime skill; and in that behalf petitioner alleges that said raft was at all times towed by said tugs with the greatest of maritime skill under the supervision of two experienced masters who have towed many rafts out of the Columbia River and across said bar; and, further, in that behalf, alleges that the trouble with said raft arose, as previously alleged herein, by the

same becoming grounded in said channel, and thereby subjected to the destructive forces of the incoming seas against the strong ebb tide, which took the control of said raft away from said tugs.

Petitioner admits that the towing machinery on each tug was operated by steam and required a steady high pressure of steam to successfully operate the same; but denies that such steam pressure was permitted to run down whereby said towing machinery could not be skillfully or properly manipulated; and denies that said towing machinery could not be skillfully or properly manipulated. Petitioner admits that in order to safely tow said raft, with the combined power and strain of both of said tugs, it was necessary that *power and strain of both of said tugs, it was necessary that* the tow-line running from the said raft to said tug "Dauntless" should have been safely and securely fastened to the towing machinery by securely fastening the ends of [110] said tow-line to the flange of the drum on the towing machinery thereof, and winding such tow-line around such drum a sufficient number of times to maintain and keep the same securely fastened thereto, and prevent the same from slipping off; and denies that by reason of carelessness and negligence of petitioner, or at all, such tow-line was not safely, or was not securely, fastened to the flange of said drum, and wound around the same a sufficient number of times to keep the same from slipping therefrom; and in that behalf alleges that said tow-line was securely fastened to the flange of said drum, and was wound around the same a sufficient number of times to keep the same from

slipping therefrom. Denies that in spite of the combined strength of said tugs, or for any other reason, or at all, said tow-line was carelessly and negligently permitted to remain wholly unsecured; and denies that it was permitted to remain wholly unsecured; and denies that it was allowed to pay out until wholly unwound from such drum; and denies that it was held in such a manner that when the strain of the two tugs was placed on such raft, it would slip off and become wholly loosened and detached therefrom, and denies that the said raft was thereby set adrift; and in that behalf petitioner alleges that said tow-line was pulled off from said drum by the power of the breakers on "Peacock Spit" suddenly catching and dragging said raft so that the same became grounded on "Peacock Spit," thereby causing said drum to unwind against the power of said towing machinery, and causing said tow-line to be torn from the flange to which it was fastened.

Petitioner denies that through its officers, and masters of said two tugs, or through any other persons, it [111] towed said raft through the northerly channel; and denies that said raft was by reason of the carelessness or unskillfulness of either petitioner, or its officers, or masters of said tugs towed too close to said "Peacock Spit" and into shallow water; and denies that petitioner, or its servants, or employees, or the navigators of the tugs "Dauntless" and "Hercules" were careless or negligent; and denies that they unskillfully maneuvered said tug "Hercules" in combination with said tug

"Dauntless"; and denies that the tow-line on said tug "Hercules" and the tow-line on said tug "Dauntless" were each, or either of them, improperly maneuvered or handled, or that they were allowed to become slackened, and then abruptly tightened; and denies that they were not cared for, or watched; and denies that either of said tugs was maneuvered in an unskillful or negligent manner; and denies that there was insufficient steam for operating the towing machinery on each of said tugs; and denies that the tow-line running from said raft, and fastened to the towing machinery on said tug "Dauntless," was not securely or safely fastened to resist the combined strain of the two tugs; and denies that it was permitted to unwind from the drum on the towing machinery of said tug "Dauntless"; and denies that no watch was placed thereon, or that no care was paid thereto; and denies that the tow-line leading from said raft to the towing machinery in the tug "Dauntless" paid out and slipped loose from said tug "Dauntless," except that it admits that it became detached, as hereinbefore alleged; and further denies that while said petitioner, through its officers, and masters of said two tugs, was towing the said raft through **[112]** the northerly channel, the tow-line leading from said raft to the towing machinery in the tug "Dauntless" paid out and slipped loose from, or became wholly detached from said towing machinery, or from said tug "Dauntless"; and denies that said raft was by reason of any carelessness or unskillfulness towed too close to "Peacock Spit" and into shallow water, or that by reason

thereof the tow-line leading from said raft to the towing machinery on said tug "Dauntless" paid out, or slipped loose from, or became wholly detached from said towing machinery, or from said tug "Dauntless"; and denies that by reason of any carelessness or negligence of petitioner, or its servants, or employees, or navigators of the tug "Hercules," or the tug "Dauntless," or by reason of any unskillful maneuvering in combination of said tug "Hercules" and said tug "Dauntless," or by reason of the tow-line on said tug "Hercules," and the tow-line on said tug "Dauntless" being improperly maneuvered, or handled, or allowed to become slackened, and then abruptly tightened, or by reason of their not being cared for or watched, or that by reason of the manner in which each of said tugs was maneuvered, or that because of the insufficient steam for operating the said towing machinery on each of said tugs, or that because of the said tow-line running from said raft and fastened to the towing machinery on said tug "Dauntless" not being securely, or safely fastened to resist the combined strain of the two tugs, or because of its being permitted to unwind therefrom by reason of there being no watch placed thereon, or care paid thereto, the said tow-line leading from said raft to the towing machinery in said tug "Dauntless" paid out and slipped loose from and became wholly detached from said towing **[113]** machinery on said tug "Dauntless."

Petitioner admits that said raft drifted over, and upon, and against said "Peacock Spit" and was broken up and became a total loss to claimant; but

denies that the drifting of said raft over, and upon said spit, was caused in the manner, or by the causes alleged by claimant.

Petitioner denies that its officers, or servants, in charge of said two tugs, or either of them, turned the tow-lines loose; and denies that after said tow-lines had become released from said tugs, or after the same had become loose, petitioner, or its servants, masters *of* officers in charge of said tugs had ample time or opportunity to secure said raft, and tow the same safely to said port of San Francisco; and denies that said petitioner, or its servants, masters or officers in charge of said tugs carelessly or negligently refused to secure said raft and tow the same safely to the port of San Francisco, or that they abandoned the same; but admits that they did not regain possession of the same, and that said raft became wholly lost, and in that behalf petitioner alleges that at the time said raft broke loose from said tugs, it was in the breakers on "Peacock Spit," with a large and heavy sea rolling in across and breaking upon the bar at the entrance to said river, and that upon said raft breaking loose, it quickly drifted farther into the breakers on "Peacock Spit" out of the reach of said tugs, and petitioner further alleges that in the conditions of the sea prevailing at the time, any attempt on the part of either of said tugs to again pick up said raft, would have been attended with the almost certain destruction of [114] said tugs, and the lives of their masters, officers and crews.

Petitioner denies that it entered into any contract

to safely tow said raft from the port of Astoria, in Oregon, to the port of San Francisco, in the State of California; and denies that there was any failure on its part to perform the contract for said towage into which it had entered, as hereinbefore alleged; and denies that said raft was lost by any failure on the part of petitioner to perform its said contract to tow said raft from the port of Astoria, in Oregon, to the port of San Francisco, in the State of California; and denies that by reason of any failure on its part to perform its contract of towage of said raft, or for any other reason, or by any other cause, claimant became, or was, damaged in the sum of $71,249.90, or any sum whatsoever. Petitioner is ignorant as to the sum in which claimant was damaged by the loss of said raft, and therefore demands that strict proof of the same be made, if it becomes material in this proceeding. Petitioner admits that no part of said sum has been paid; but denies that the whole, or that any part thereof, is now due, or owing.

Petitioner denies each and every of the remaining allegations of said paragraph.

WHEREFORE, petitioner prays that the claim of the Hammond Lumber Company, claimant herein, may be disallowed and dismissed with costs.

IRA A. CAMPBELL and
PAGE, McCUTCHEN, KNIGHT, OLNEY,
Proctors for Petitioner. **[115]**

United States of America,
State of California,
City and County of San Francisco,—ss.

W. J. Gray, being first duly sworn, on oath deposes and says:

That he is the Vice-president of the Shipowners & Merchants' Tugboat Company, petitioner herein; that he has read the foregoing objections and answer to the claim of the Hammond Lumber Company filed herein; that he knows the contents thereof and believes the same to be true.

W. J. GRAY.

Subscribed and sworn to before me this 27th day of September, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. **[116]**

Service of the within Objection, etc., and receipt of a copy is hereby admitted this 27th day of Sept., 1912.

DENMAN & ARNOLD,
Proctors for ————.

[Endorsed]: Filed Sep. 27, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. **[117]**

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Notice of Motion of the Hammond Lumber Company, Sole Claimant, for Dismissal of Petition for Limitation, on the Ground of Want of Jurisdiction.

To the Petitioner, and to Its Counsel, Messrs. McCutchen, Olney and Willard, and to Ira A. Campbell, Esquire:

You, and each of you, will please take notice that on Saturday, the 25th day of October, 1913, at the opening of court on the morning of said day, the Hammond Lumber Company will move the said Court for the dismissal of the petition herein, upon the following grounds appearing in the record of this case, to wit:

I.

That the record shows that there is but one claimant herein, the Hammond Lumber Company, a corporation; that the time for the filing of claims has long since elapsed and that default has been taken against all other persons claiming damage, loss or injury arising from the acts set forth in the petition for limitation; that the said petition sets forth but

one claim for loss, damage or injury arising from the acts described in said petition, to wit, that certain suit filed by the Hammond Lumber Company, in the Circuit Court for Clatsop County, State of Oregon, for the recovery of damages for the loss of the log raft described in said [118] petition; that said suit is a suit to recover the sum of Seventy-one Thousand Two Hundred and Forty-nine and 90/100 Dollars ($71,249.90), and interest and costs.

II.

That the petitioner herein has enjoined the prosecution of the said suit in Clatsop County, and that claimant, the Hammond Lumber Company, has filed herein its claim for the said sum, viz., Seventy-one Thousand Two Hundred and Forty-nine and 90/100 Dollars ($71,249.90), with interest and costs, for the said loss of said log raft.

III.

That it appears from the libel herein that the said log raft was towed by two tugs owned by the petitioner, in the following manner, viz., the said log raft was attached to the towing machine of the tug "Dauntless," and the said tug "Dauntless" was attached to the towing machine of the said tug "Hercules," the two tugs towing in tandem, the power of both tugs being exercised on the towing machine of the "Dauntless" and thence through the towing-line of the log raft to the log raft; that the said contrivance of tandem tugs so towing said log raft was a single contrivance as to the application of the towing power of the tugs to the log raft, and as to the course over which the tandem contrivance should

travel in performing the contract of towage described in the said petition, and that therefore the said tandem contrivance of the said two tugs must be surrendered or a stipulation for their value given as a prerequisite to jurisdiction for limitation of liability if said jurisdiction can be acquired in any event.

IV.

That due appraisement of the said two tugs has heretobefore been had and the total value of the same found to be [119] greatly in excess of the claim of your claimant, being the only claim on file herein; that by reason of the fact that there is but one claim on file herein, and that claim for a less amount than the stipulation for the value of the said tugs and their freight pending, said Court has no jurisdiction to hear and determine the question raised by the claim herein or in the said suit in the Circuit Court of Clatsop County, Oregon, viz., as to the negligent navigation and management in the towing of said log raft by the said tandem contrivance of the said two tugs, and that no jurisdiction in this court exists to deprive the said claimant of its right to a jury trial in the said Circuit Court in the suit aforesaid.

V.

That the claimant relies in its said motion to dismiss the said petition for limitation on all pleadings, papers, documents, entries and filings in the record of this proceeding to limit liability.

WHEREFORE claimant moves that the said petition for limitation of liability be dismissed and the

claimant herein recover its costs against the petitioner.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Claimant. **[120]**

Due service and receipt of a copy of the within Notice of Motion is hereby admitted this 21st day of October, 1913.

McCUTCHEN, OLNEY & WILLARD,
Attorney for Petitioner.

[Endorsed]: Filed Oct. 23, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[121]**

[Order of Submission of Motion to Dismiss as to the Hammond Lumber Co.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 13th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,234.

In re Petition for Limitation of Liability of Tugs "DAUNTLESS" and "HERCULES."

The motion to dismiss this proceeding as to the Hammond Lumber Company, sole claimant herein, this day came on for hearing, Wm. Denman, Esq.,

appearing for, and Ira Campbell, Esqr., opposing said motion, and after hearing argument by the Court ordered that said motion be submitted to the Court for decision. [122]

[Order Dismissing Proceeding and Retaining Jurisdiction.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 10th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#15,234.

In re Petition of SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

The motion to dismiss this proceeding as to the Hammond Lumber Company, sole claimant herein, having been heretofore submitted to the Court for decision, now after due consideration had thereon, the Court files its written opinion and by the Court ordered that this proceeding be and the same is hereby dismissed as to said claimant. Further ordered that the jurisdiction of this proceeding be and the same is hereby retained for the protection of petitioner against any other possible claims. [123]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of The SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Opinion.

IRA A. CAMPBELL, McCUTCHEN, OLNEY & WILLARD, Proctors for Petitioner.

DENMAN & ARNOLD, Proctors for Claimant.

The undisputed facts appearing thus far in this proceeding to limit liability are, briefly stated, as follows:

In August, 1911, the Hammond Lumber Company (hereinafter designated claimant) and the Shipowners & Merchants' Tugboat Company (hereinafter designated petitioner), entered into a contract wherein the latter agreed, in consideration of the sum of $2,250.00, to tow for the former a large raft of piling and spars from Astoria to San Francisco. Pursuant to this contract claimant delivered to petitioner in September, 1911, such raft at Flavel in the port of Astoria to be by petitioner towed to San Francisco. Petitioner for the purpose of towing said raft out of the Columbia River and across the bar thereof, made use of two of its tugs the "Dauntless" and the "Hercules" in the **[124]** following manner. The tug

"Dauntless" was fastened to the raft with a long towing cable, one end of which was wound around the drum of the towing machinery on said "Dauntless," and the other end of which was fastened to the raft, and the tug "Hercules" was fastened to the tug "Dauntless" with a long towing cable leading through the forward bitts of the "Dauntless" to the towing machine of the "Hercules." The two tugs thus in tandem started to sea with the raft, but whether because of the negligence of petitioner as alleged by claimant, or because of the perils of the sea, as claimed by petitioner, the line from the "Dauntless" to the raft parted and the raft became a total loss. Claimant in November, 1911, commenced an action against petitioner in the Circuit Court of the State of Oregon for Clatsop County for $71,249.90, for the loss of said raft, alleging that such loss was due to the negligence of petitioner. This action is now, and was, before the filing of the stipulation hereinafter mentioned, at issue upon the amended complaint of claimant and petitioner's answer thereto. On February 27th, 1912, petitioner filed in this Court its petition for limitation of liability, but praying that if such liability be found to exist it be limited to the value of the tug "Dauntless," yet also offering to deliver the tug "Hercules" in case it be found that this tug also is liable, and praying further that all claims arising against petitioner by reason of said voyage be heard and determined in this court; and that all other proceedings be stayed. Appraisement having been duly made of the two tugs the value of the "Dauntless" was fixed at $45,000.00, [125] and

of the "Hercules" at $70,000, for which values a stipulation was filed by petitioner. No person other than claimant having made any claim herein, in due time, and on July 12th, 1912, an interlocutory decree of default against all persons other than claimant was duly entered. Claimant now moves the Court to dismiss the petition for limitation of liability as to it, and for leave to prosecute its action in the Oregon State Court, upon the grounds: 1. That there is only one claim made herein; and 2. That that claim is for much less than the appraised value of the tugs "Dauntless" and "Hercules," and that for these reasons there is no occasion for limitation of liability, and no reason for depriving claimant of its common-law remedy of trial by jury. Petitioner resists the motion, insisting that as this court has rightly acquired jurisdiction of this proceeding and of claimant, it should retain it until the whole matter is disposed of, and insisting further that in no event can the tug "Hercules" be held liable; that as the value of the "Dauntless" is only $45,000, while claimant seeks to recover $71,249.90, petitioner's liability should be limited to said sum of $45,000, and therefore this Court must retain and dispose of the whole question.

The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where [126] there are more claimants than one. Where there is but one claimant, however, and his claim is for much

less than the amount to which, the liability of the shipowner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants. If the tug "Hercules" is equally liable with the tug "Dauntless" for the loss of the raft in question, we have the case here of a single claimant for an amount much less than that to which petitioner's liability may in any event be limited.

Both tugs being engaged in the same venture, at the time of the disaster, are equally liable, if there be liability at all, though the tug "Dauntless" was the only one attached directly to the raft.

The Columbia, 73 Fed. 237.

Thompson Towing Co. vs. McGregor, 207 Fed. 212.

Under the peculiar circumstances of the present proceedings I am of the opinion that petitioner's protection does not require that this court should further restrain claimant from prosecuting its action in the State Court, and that as to said claimant the proceedings should be dismissed. The same result might perhaps, be attained by dissolving the restraining order in so far as it applies to claimant, but I am satisfied that as claimant has moved to dismiss, instead of for a dissolution of the restraining order, its motion should be granted. The proceeding as to claimant is, therefore, dismissed. The Court, however, will retain jurisdiction of the proceedings for the [127]

protection of petitioner against any other possible claims.

January 10th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 10, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [128]

[Order Staying Proceedings for Twenty Days.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#15,234.

In re Petition of SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

On motion of Ira Campbell, Esqr., attorney for petitioner herein, by the Court ordered that proceedings in accordance with the opinion filed herein, be and the same are hereby stayed for a period of twenty days from this date. [129]

In the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Decree.

The motion of the Hammond Lumber Company, a corporation, to dismiss the petition herein, in so far as it applies to the Hammond Lumber Company, coming on duly to be heard, and it appearing that the claim of the Hammond Lumber Company is the only claim on file in this proceeding; and it further appearing that after due notice published and reserved, as required by law, a default has been entered herein against all persons, if any there be, entitled to file a claim in this proceeding; and it further appearing that the size of the fund for the payment of the sole claim herein filed, to wit, that of the Hammond Lumber Company, exceeds the claim of the Hammond Lumber Company:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the said petition be dismissed as to the said Hammond Lumber Company, claimant herein, and that said petitioner take nothing against said Hammond Lumber Company by the said petition; and,

IT IS FURTHER ORDERED, ADJUDGED

AND DECREED, that said Hammond Lumber Company do have and recover its costs herein; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the above order and decree shall in no wise affect the rights of the [130] petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be.

Dated January 13th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 13, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [131]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Order Staying Proceedings [to and Including February 7, 1914].

IT IS HEREBY ORDERED that all proceedings in the above-entitled matter be and the same are hereby stayed five days from and after the second day of February, 1914.

Dated January 29, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 29, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [132]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to Claimant and Respondent, Hammond Lumber Co., and to W. S. Burnett, Esq., and Messrs. Denman & Arnold, Its Proctors:

You and each of you will hereby please take notice that The Shipowners and Merchants' Tugboat Company, a corporation, owner of the steam tugs "Dauntless" and "Hercules," and petitioner herein, hereby appeals from the final decree made and entered herein on the 13th day of January, 1914, granting said proceeding as to said Hammond Lumber Company, to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit, at the City and County of San Francisco.

Dated February 5th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Said Petitioner. [133]

Service of the within Notice of Appeal and receipt of a copy is hereby admitted this 5th day of February, 1914.

WILLIAM DENMAN,
W. S. BURNETT,
DENMAN AND ARNOLD,
Proctors for Claimant, Hammond Lumber Company.

[Endorsed]: Filed Feb. 5, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [134]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Assignment of Errors.

Now comes the Shipowners & Merchants' Tugboat Company, a corporation, petitioner in the above-entitled action, and appellant herein, and says:

That in the record, opinion, decision and final decree in said cause, there is manifest and material error, and said appellant now makes and files and presents the following assignment of errors on which it relies, to wit:

(1) The District Court erred in rendering the decree herein of date, the 13th day of January, 1914,

against the steam tugs "Dauntless" and "Hercules" and said petitioner, the Shipowners & Merchants' Tugboat Company;

(2) The District Court erred in dismissing the petition because only one claim had been presented;

(3) The District Court erred in dismissing the petition as to the Hammond Lumber Company;

(4) The District Court erred in holding that the tug "Hercules" must be surrendered; [135]

(5) The District Court erred in holding that each tug, being operated by its own master independently and being propelled by its own power, must be surrendered;

(6) The District Court erred in holding both tugs to be one vessel;

(7) The District Court erred in holding that the tugs "Dauntless" and "Hercules" were equally liable, if there be liability at all;

(8) The District Court erred in determining from the pleadings that, if there be liability at all, both tugs were equally liable;

(9) The District Court erred in not proceeding to a trial and a determination of the issues;

(10) The District Court erred in not proceeding to determine which tug was in fault, if either was in fault, after having acquired jurisdiction of all the parties.

(11) The District Court erred in not proceeding to determine, after trial, the liability of the petitioner for any act of either or both of said tugs, and if liability was found to exist, in not thus proceeding to

determine the right of petitioner to a limitation of its liability therefor.

Dated March 21, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Petitioner and Appellant.

[Endorsed]: Filed Mar. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [136]

[Stipulation and Order Enlarging Time to March 22, 1914, to Print and File Record in Appellate Court.]

In the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

IT IS HEREBY STIPULATED AND AGREED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals may be extended fifteen days.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Petitioner.

WILLIAM DENMAN,
W. S. BURNETT,
DENMAN & ARNOLD,
Proctors for Claimant.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby enlarged and extended fifteen days from and after the 7th day of March, 1914.

M. T. DOOLING,
District Judge. [137]

[Endorsed]: Filed Mar. 7, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [138]

[Stipulation and Order Extending Time to March 25, 1914, to Print and File Record in Appellate Court.]

In the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

IT IS HEREBY STIPULATED AND AGREED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals may be extended to and including the 25th day of March, 1914.

Dated March 19, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Petitioner.

WILLIAM DENMAN,
W. S. BURNETT,
Proctors for Claimant. [139]

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby enlarged and extended to and including the 25th day of March, 1914.

Dated: March 21st, 1914.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Mar. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [140]

[Certificate of Clerk U. S. District Court to Apostles.]

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and forty (140) pages, numbered from 1 to 140, inclusive, contain a full, true and correct transcript of the records, documents, etc., as the same now appear on file and of record in the

Clerk's Office of said District Court, in the cause entitled "In the Matter of the Petition of The Shipowners and Merchants' Tugboat Company, a Corporation, Owner of the Steam Tugs 'Dauntless' and 'Hercules,' for Limitation of Liability, No. 15,234." Said transcript is made up pursuant to and in accordance with "Praecipe for Apostles on Appeal" (a copy of which is embodied in this transcript), and the instructions of Messrs. McCutchen, Olney and Willard, and Ira A. Campbell, Esquires, proctors for petitioner and appellant.

I further certify that the cost of preparing and certifying the foregoing Transcript of Appeal is the sum of Sixty-seven Dollars and Seventy Cents ($67.70), and that the same has been paid to me by proctors for petitioner and appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of March, A. D. 1914.

[Seal] W. B. MALING,
Clerk.
By Lyle S. Morris,
Deputy Clerk. [141]

[Endorsed]: No. 2388. United States Circuit Court of Appeals for the Ninth Circuit. The Shipowners and Merchants' Tugboat Company, a Corporation, Owner of the Steam Tugs "Dauntless" and "Hercules," Appellant, vs. Hammond Lumber Company, a Corporation, Appellee. In the Matter of the Petition of the Shipowners and Merchants' Tugboat

Company, a Corporation, Owner of the Steam Tugs "Dauntless" and "Hercules," for Limitation of Liability. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed March 25, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

In the Matter of the Petition of the Shipowners and Merchants' Tugboat Company (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules", for limitation of liability.

BRIEF FOR APPELLANT.

Statement of Facts.

On the 9th day of September, 1911, at Astoria, Oregon, the Hammond Lumber Company, appellee (claimant below), delivered a large raft of piling to the master of appellant's tug "Dauntless", to be towed

to the port of San Francisco. The tug was made fast to the raft by means of a long steel towing hawser attached to the towing machine of said tug, and the hawser was fastened to the raft with a heavy chain attached to the raft by the employees of appellee constructing same.

The master of the tug "Dauntless" being unable to procure the services of a bar tug to assist him out of the Columbia River and across the bar, called to his aid appellant's tug "Hercules". The "Hercules" then made fast to the tug "Dauntless" by means of a long steel towing hawser attached to the towing machine on the "Hercules" and to the forward bitts of the "Dauntless". Upon being made fast as aforesaid, the tug proceeded with said raft down the river from Astoria and continued, during the afternoon, through the channel at the entrance of said river toward the open sea. At the time the tow started, and for the greater part of the afternoon, the sea and weather conditions were favorable to a successful towing of said raft across the bar, and, in making said tow, said tugs kept in the usual channel down said river taken by vessels proceeding to sea, passing the usual and a safe distance off and to the northward of the buoys marking the southerly side of the said channel at the entrance of said river. As said raft reached channel buoy No. 4, it stuck and said tugs were unable to make any headway with it, and at about that time the tide began to ebb strong, and the sea at the entrance began to make until a tremendous sea was running in across the bar and up the entrance

against the increasing ebb tide. By reason of said sea and tide, the raft became unmanageable.

Said raft was gradually turned and swept broadside against said sea until the after end of said raft tailed off toward the breakers on Peacock Spit. Said tug continued pulling until after it passed the black buoy marking the northerly side of said channel off Peacock Spit, when suddenly and without warning said raft pulled the towing hawser off the towing machine on the tug "Dauntless", and upon being so freed, drifted into the breakers on Peacock Spit, and became a total loss.

Thereafter, in November, 1911, appellee commenced an action in the Circuit Court of the State of Oregon for Clatsop County against appellant to recover $71,249.90, alleged to have been the value of said raft of piling and its equipment. In due course, appellant answered in said cause denying all liability for the loss of said raft, and thereafter, filed in the District Court below its petition for limitation of liability, as authorized by the Revised Statutes of the United States and the rules of the Supreme Court governing such proceedings.

In said petition for limitation of liability, the circumstances under which said raft was lost were set forth, and all liability therefor denied. It was further alleged that the loss of said raft, and all other damages and injuries whether to persons or property done, occasioned, and incurred upon the voyages of said tug "Dauntless" and of said tug "Hercules" were done,

occasioned and incurred without the consent or privity or knowledge or design or neglect of petitioner (appellant) or of any of its directors or officers or servants, or of either of said tugs. Appellant claimed the right to contest its liability and the liabilities of each of said tugs "Dauntless" and "Hercules" for any injuries, losses and damages, whether to persons or to property caused, occasioned or incurred upon said voyages, and particularly for the loss of said raft of piling, under Sections 4282 to 4289, inclusive, of the Revised Statutes of the United States and the Acts amendatory thereof, and offered to give its stipulation or stipulations, with sufficient sureties, conditioned for the payment into court of the value of said tug "Dauntless", and said tug "Hercules", if required, as they were immediately after the termination of said voyages upon which said raft was lost, with interest thereon, together with their and each of their freight pending, except that the offer to give a stipulation for the payment into court of the value of the tug "Hercules", and her freight pending, was under protest for the reason that if there was any liability on the part of appellant for the loss of said raft, it was solely because of the breaking away of said raft from said tug "Dauntless", and was not because of, or contributed to by, any act or thing done, occasioned or incurred by said tug "Hercules", or any of her officers or crew, and because the loss of said raft was not participated in by said tug.

It was accordingly prayed in said petition that an order of appraisement be had of the values of the

said tugs "Dauntless" and "Hercules", and of their freight pending, if any, at the close of their voyages, and that stipulations or undertakings might be given by appellant, with sureties, conditioned for the payment into court of the appraised value whenever the same should be ordered; and it was further prayed that, upon the filing of such stipulations, a monition issue against the Hammond Lumber Company, appellee, and all other persons claiming damages by reason of injuries to persons or property occurring or arising upon said voyages, or resulting from the loss of said raft, citing them to appear before said court and there make due proof of their respective claims, as to all of which claims appellant gave notice that it would contest its liability and the liabilities of said tugs "Dauntless" and "Hercules", and particularly the liability of said tug "Hercules" independently of the limitation of liability claimed under the Revised Statutes.

It was further prayed that the court determine that no liability existed on the part of appellant, or said tug "Dauntless" for any act or thing done or occasioned by said tug upon said voyage on which said raft was lost, and particularly that no liability existed on the part of appellant or said tug "Hercules" for the loss of said raft, and that the court would be pleased to release the stipulation for value of said tug "Hercules", and her freight, if any, pending, for the reason that neither said tug, nor her officers or crew, participated in the loss of said raft. It was further prayed, if the court found that any liability existed

on the part of appellant by reason of injuries to persons, or loss of or damage to property done, occasioned or incurred upon said voyages, and particularly for the loss of said raft, that said liability should in no event be permitted to exceed the value of said tug "Dauntless", and her freight, if any, pending; and, if the court should find that liability existed on the part of said tug "Hercules", or of appellant for any act or neglect of said tug, that such liability should in no event be permitted to exceed the value of said tugs "Dauntless" and "Hercules" and their freights, if any, pending, at the close of their respective voyages upon which said raft was lost, as such values might be determined by the appraisement of appellant's interest therein; and that the money secured to be paid into the court should, and might, after payment of costs and expenses therefrom, be divided pro rata among the several claimants in proportion to the amount of their respective claims.

The issuance of a restraining order was requested, restraining said Hammond Lumber Company from further prosecuting said suit commenced in the Circuit Court of the County of Clatsop, State of Oregon, and restraining all other persons from prosecuting any suits against said petitioner or said tugs, or either of them, save only in said District Court in respect to the loss of said raft, on any and all claims arising upon said voyages.

Thereafter, an order was entered referring said matter to the Honorable James P. Brown, United States Commissioner, for the making of due appraise-

ment of the value of the interest of petitioner in said tugs "Dauntless" and "Hercules" at the close of their respective voyages, upon which said raft was lost, together with the amount of their freight pending. Notice of said appraisement was given to said Hammond Lumber Company, and, thereafter, in due course said appraisement was had and the report of said commissioner duly and regularly filed, appraising the value of the interest of petitioner in said tug "Dauntless" at the sum of $45,000, and in said tug "Hercules" at the sum of $70,000. Said report was approved and the order entered on the 29th day of March, 1912, directing said petitioner (appellant) to file with said court undertakings, with good and sufficient sureties, in the respective sums of $45,000 and $70,000, with interest thereon from the 9th day of September, 1911, conditioned for the payment into court by said petitioner of the values of the said tugs "Dauntless" and "Hercules" as determined by said commissioner. Stipulations in accordance with said order were duly and regularly filed by said petitioner, and, thereafter, pursuant to an order of said court, a monition was issued citing all corporations, person or persons, claiming damages for any loss, damage or injury occurring or arising upon said voyage of said steam tugs "Dauntless" and "Hercules", leaving the port of Astoria, Oregon, on the morning of the 9th of September, 1911, and particularly citing the Hammond Lumber Company (appellee), claiming damages for the loss of said raft of piling, to appear before said court, and make due proof of their respective

claims before the Honorable James P. Brown, United States Commissioner at his office, on or before the 10th day of July, 1912, and to appear and answer the allegations of the libel and petition. Said monition was served upon the Hammond Lumber Company, and was duly and regularly posted and published as required by law and the order of said District Court, and no claimants appearing in response thereto, save said Hammond Lumber Company, an interlocutory decree of default was thereafter entered on the 12th day of July, 1912, ordering, adjudging and decreeing the default of all persons and corporations, save and except said Hammond Lumber Company, having any claims against said petitioner, or said tugs "Dauntless" and "Hercules", for any loss, damage or injury occurring or arising upon said voyages.

Thereafter, on the 30th day of July, 1912, said Hammond Lumber Company filed its claim in said proceedings, claiming the value of said raft in the sum of $71,249.90. An answer was filed by said Hammond Lumber Company to said petition for limitation of liability, admitting and denying the allegations of said petition, and particularly denying that the loss of said raft of piling and all other damages and injuries whether of persons or of property done, occasioned and incurred upon said voyage by said tug "Dauntless" or said tug "Hercules", or any of them, were done, occasioned and incurred without the consent, or privity, or knowledge, or design, or neglect of petitioner, or any of its directors, officers or servants, or of either of said tugs, and in that

behalf alleged that the loss of said raft of piling was occasioned by the neglect of petitioner and of its officers, servants and said tugs. The institution, on or about the 9th day of November, 1911, of said action in the Circuit Court of the County of Clatsop, State of Oregon, was alleged, and a denial interposed that the loss of said raft was solely caused by the breaking away of said raft from said tug "Dauntless", and that it was not caused or contributed to by any act or thing done, occasioned or incurred by said tug "Hercules", and that the cause of the loss of said raft was not participated in by said tug; and in that behalf said answer alleged that it was a fact that said tug "Hercules" was pulling upon said tug "Dauntless" at the time they broke away from said raft, and that the power of said tug "Hercules" so applied to said tug "Dauntless" actually contributed to the force which caused said raft to break away, and further that it appeared that said tug "Hercules", being in the lead of said tandem of tugs, necessarily participated in choosing the path through which the said tugs and tow passed.

It was prayed in said answer that the petitioner take nothing by its petition, and that the same should be dismissed, and that claimant be permitted to pursue its suit in said state court, and that in the event that the court should hold that it had jurisdiction of the said petition for limitation, that it deny said limitation. Exceptions to the petition were filed alleging the insufficiency of the petition to give the court jurisdiction for adjudicating the limitation of liability on

the ground that it failed to show that more than one person was damaged by reason of the acts set forth in said petition; and on the further ground that the petition failed to show that the value of the said tugs, or the value of either of them, was less than the loss, damage or injury done.

Thereafter, appellant filed its objection and answer to the claim of said Hammond Lumber Company, as by the rules provided.

Subsequently, on the 23rd day of October, 1913, said Hammond Lumber Company filed a motion with said court, praying for the dismissal of the petition upon the ground that there was but one claimant, the Hammond Lumber Company, and that default had been taken against all other persons claiming damage, loss or injury arising from the act set forth in the petition for limitation, and that said petition set forth but one claim, to wit, that certain suit filed by the Hammond Lumber Company, in the Circuit Court of the County of Clatsop, State of Oregon, wherein recovery was sought in the sum of $71,249.90. Said motion stated the further ground that it appeared from the petition that the raft was towed by two tugs in the manner described in said answer of said Hammond Lumber Company, and alleged that said two tugs must be surrendered, or a stipulation for their value given, as a prerequisite for limitation of liability if jurisdiction could be acquired in any event. It further set forth that due appraisement of said tugs had been made, and that the total value of the same was greatly

in excess of the claim of said Hammond Lumber Company, and alleged that by reason of the fact that but one claim for less amount than the stipulation for the value of said tugs, and their freight pending, had been filed in said court, that the court was without jurisdiction for hearing and determining the question raised by the claim, or in the said suit pending in the Circuit Court of Clatsop County, State of Oregon.

Thereafter at a stated term of the District Court on the 10th day of January, 1914, said motion to dismiss came on for hearing before the Honorable M. T. Dooling, judge of said court, and oral argument being had, said court thereafter rendered its opinion directing the dismissal of said limitation proceedings as to said Hammond Lumber Company, but retaining jurisdiction of the proceedings for the protection of the petitioner against any other possible claims. A decree was entered in accordance with said opinion, and, thereafter, this appeal was duly and regularly prosecuted from said decree.

SPECIFICATIONS OF ERROR.

Errors have been assigned, in the apostles on appeal, to the decree of the District Court dismissing the petition as to the Hammond Lumber Company.

The assignment of errors will be discussed, for convenience, under the following specifications:

I.

The court erred in dismissing the petition as to the Hammond Lumber Company, appellee, because only one claim had been presented. (Assignments 1, 2, 3.)

II.

The court erred in holding both tugs must be surrendered, and in dismissing the petition as to the Hammond Lumber Company, appellee, because the values of the two tugs exceeded the amount of appellee's claim. (Assignments 1, 4, 5, 6 and 7.)

III.

The court erred in holding that both tugs were equally liable, if any liability existed at all, for the loss of said raft, and in dismissing the petition as to the Hammond Lumber Company, appellee, because the combined values of said tugs exceeded the claim of appellee. (Assignments 1, 2, 5, 6, 7, 8.)

IV.

The court erred in dismissing the petition as to the Hammond Lumber Company, appellee, because only one claim had been presented, of less amount than the combined values of said tugs, without first proceeding to trial, and determining whether both of said tugs were, or only one of said tugs was, liable, if liability existed at all, for the loss of said raft. (Assignments 1, 4, 5, 6, 7, 8, 9, 10, 11.)

Argument.

I.

APPELLANT HAD THE RIGHT TO INVOKE THE SPECIAL PROCEEDING FOR LIMITATION OF LIABILITY IN THE DISTRICT COURT NOTWITHSTANDING BUT ONE CLAIM WAS PRESENTED. (Specification 1.)

The right of a shipowner to invoke the special proceeding for limitation of liability provided by Sections 4282 to 4289 of the Revised Statutes of the United States, and acts amendatory thereof, and by the rules of the Supreme Court, where only one claim is presented, on which suit at law has been already instituted at the time of the filing of the petition, has been both denied and affirmed, but the weight of authority and the accepted practice supports the right and duty of the District Court to entertain the special proceeding.

The question, apparently, first came before the courts in 1892, in

The Rosa, 53 Fed. 133,

wherein Judge Brown dismissed a petition on behalf of the New York Harbor Tugboat Company. The tugboat company filed its petition after an action for wrongful death had been instituted against it in one of the state courts by Eliza Burns, administratrix of the estate of her husband.

The court held that it was apparent from the petition that but one claim could arise, and that Section 9 of the Judiciary Act of 1789,

> "saving to suitors in all cases the right to a common law remedy where the common law is competent to give it",

forbade any interference with the action in the state court, when the whole subject matter and all the rights of both parties could there be perfectly adjudicated and preserved. He pointed out that the statutory limitation could be obtained by setting up in the answer the value of the steamer, and thereby making it one of the issues in the case. It is to be noted, however, that the ruling is to be expressly conditioned upon the possibility of a perfect adjudication and preservation of the rights of both parties in the ordinary course of a common law suit. The court was careful not to make a ruling to include all cases in which there was only one claim, and suggested that circumstances might possibly arise in which no proper authority existed for the shipowner to avail himself of the statutory defense in a common law suit upon a single claim. This qualification is of importance when attempt is made to apply the decision to the case at bar as made out by the petition, for if the later falls within the possible exception which Judge Brown admitted might exist, the decision is without weight.

The case was followed by Judge Brown in

The Eureka, No. 32, 108 Fed. 672,

where he strongly adhered to his former decision. There, again, the primary reason advanced for his conclusion was that the common law afforded an adequate remedy whereby liability could as well be limited by an order in the state courts as by special proceedings. But even then, he admitted that a common law remedy was not competent to give relief,

if the appointment of a trustee was necessary, though he apparently restricted the necessity of a trustee to a case where several claims required a pro rata contribution. It is to be noted, however, that the only provision made for a trustee is the transfer to him of the petitioner's interest in the vessel, if the latter elects to make the transfer, rather than giving a stipulation for value. (Admiralty Rule 54, Rev. St. Sec. 4285.) Inasmuch as the right of surrender is conferred upon a shipowner, it is difficult to see, under Judge Brown's admission, how the common law can afford the relief granted by the statute and the rules. His admission of the inability of a common law court to appoint a trustee, is tantamount to saying that if a shipowner elects that relief, the special proceeding is necessary, as the rules confer upon him the privilege of surrender. The right to the special proceeding is inviolate, and is not dependent upon the number of claims against which limitation is sought.

The third and last decision denying the right to the special proceeding was that of

The Lotta, 150 Fed. 219,

decided by Judge Brawley, of the District Court for the District of South Carolina, in 1907. *It was expressly held that the District Court had jurisdiction of the question of the right to limit.*

In that case an action had been commenced in the state court by one Vose, as administrator, against the owner of the "Lotta", to recover damages for the death of his son. Judge Brawley followed *The Rosa*

and *The Eureka No. 32,* rather than those courts which had arrived at an opposite conclusion. There, as in *The Rosa,* and *The Eureka No. 32,* a claim was in question over which the admiralty court had no original jurisdiction, a fact recognized and taken into consideration by both Judge Brawley and Judge Brown. While the decision followed the ruling in *The Rosa* and *The Eureka No. 32,* there is found, however, in the concluding paragraph of Judge Brawley's opinion, this significant qualification to which we shall later refer:

> "The petition, however, will not be dismissed; for, if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question."

The foregoing are the only decisions refusing to entertain special limitation proceedings where but one claim existed, on which a prior suit had been instituted in a common law court. In none of them, however, is the rule laid down as broadly applicable to all cases. In fact, in each decision, a limitation is to be found, for both Judge Brawley and Judge Brown expressly based their opinions upon the certainty of an adequate remedy at common law which would as effectually secure the statutory limitation to the shipowner as the special proceeding provided by the statutes and the rules of the Supreme Court. Unless, therefore, the case at bar comes squarely within the narrow limits of those decisions, they are

not, even though sound in principle as applied to the special circumstances of those cases, controlling here.

The weight of authority, however, upholds the right of a shipowner to invoke the special proceeding for limitation, even though but one claim exists, to say nothing of the recognition of such right where the common law fails to give an adequate remedy, or the right of limitation is questioned, or where the claim, purely maritime in character, is one over which the District Court would have jurisdiction in the first instance.

The earliest reported decision is that of the Circuit Court of Appeals for the First Circuit in

Quinlan v. Pew, 56 Fed. 111,

affirming the decision of the District Court.

One Quinlan, who was on a lay on the fishing schooner "Essex", was injured in the course of his duties by the giving way of certain parts of the vessel's rigging. Suit was brought in the United States Circuit Court, and, thereafter, limitation proceedings were instituted by the owners in the District Court. The Circuit Court of Appeals, speaking through Circuit Judge Putnam, frankly said that it could not accept the ruling laid down in *The Rosa,* supra, denying the jurisdiction of the admiralty courts to entertain the proceedings provided by statute and by the Supreme Court rules, where but one claim existed. The court reviewed the statutes and Supreme Court rules, analyzing them as did Judge Brown, but reached an opposite conclusion as to their exclusive

operation. That portion of the opinion devoted to the discussion of the question is so pertinent that we quote it at length:

> "The appellant also objects that it appears from the proceedings that the claim of Quinlan is the only outstanding one against the vessel, or owners as owners, and that this fact brings the case within *The Rosa*, 53 Fed. Rep. 132, where it was held that the statute limiting liability does not apply under such circumstances. As already said, the state of the record is as claimed by the appellant; yet this court cannot accept the rule laid down in *The Rosa*. The statute right to surrender the vessel to a trustee appointed by any court of competent jurisdiction, which in maritime matters necessarily includes the admiralty courts, and to be thus relieved from liability, is protected both by the letter of the statute and by its reason, whether there are numerous claims outstanding, or but one; and the right to have the vessel appraised under admiralty rule 54 is necessarily coextensive with the right to surrender. Indeed, under admiralty rule 56, the owners may bring the entire contest into the admiralty court, even though they finally establish a contention that there are no valid claims whatever. The rule in *The Rosa* is quite impracticable, as it is frequently impossible for the owners of vessels navigating foreign seas, remote from their personal control, to be assured as to the extent to which they may be subject to liens and claims of various kinds. The original act of 1851 (section 4) uses both the plural and singular; and there is no such change found in the Revised Statutes as would justify the court in holding that congress intended any substantial innovation. Indeed the Revised Statutes (section 4285) use both the plural 'claimants,' and the singular, 'person,' thus bringing forward the plural and singular of the original act. The statute was intended for the encourage-

ment of commerce, and would not receive its full effect, to the extent given by the Supreme Court in Providence & New York Steamship Co. v. Hill Manuf'g Co., 109 U. S. 578, 588, 589, 3 Sup. Ct. Rep. 379, 617, if the owner of a vessel or wreck, under the circumstances of there being but a single claim outstanding, large enough to absorb the entire vessel or her salvage, could be compelled, on the verdict of a jury, to pay perhaps vastly more than her real value, or be forced to the trouble and expense of litigating any issue of that character. The appellant treats the jurisdiction to be exercised under the statute as though governed exclusively by the principles applicable to courts of equity. But with these neither the statute nor the proceedings under it, so far as concerns the admiralty courts, have any relation, except merely incidentally, whenever it happens that the claims are in excess of the value of the vessel or her salvage. In that event the rules of equity procedure come in, not for the purpose of determining the jurisdiction of the court, but only as they relate to proceedings in bankruptcy, or any other proceedings, when marshaling of assets becomes incidentally necessary.

Therefore, we hold that the owners of this vessel are entitled to a decree limiting their liability, so that the district court had jurisdiction to adjudicate the merits of the appellant's claim."

The authority of that case was followed by Judge McPherson, of the District Court of the Eastern District of Pennsylvania, in

The S. A. McCaulley, 99 Fed. 302,

but not without much reluctance as applied to the special circumstances of the case, as the court felt the injustice of the special proceeding under the facts before him. Suit had been brought by one Laughlin

in the state court against the owner of the tugboat "McCaulley". The action was there defended, but a verdict returned. Appeal was taken to the Supreme Court of the State of Pennsylvania, which reversed the trial court for the latter's refusal to entertain the partial defense of limited liability. Following the decree of the Supreme Court, the special proceeding for limitation of liability, provided by the Revised Statutes and the Rules of the Supreme Court, was instituted. Judge McPherson plainly spoke his mind against the action of the petitioners in having defended the case on its merits in the state court, and then, two years later, after defeat, resorting to the admiralty court where they might have gone in the first instance, or, as he stated it:

> "By following the course described, the petitioners have been enabled to take their chances of success before a tribunal where they might hope to defeat the claim entirely by proving the contributory negligence of the decedent; and now, having discovered that this effort is likely to be unsuccessful, they have determined to try their fortunes in a different jurisdiction, and by a different method of trial. The merits have been once determined against them by a jury; and, although the judgment has been reversed, it was reversed merely for the reason that the right to limit the defendant's liability had not been applied by the court below. The result is to give the petitioners an undue advantage. *But, as I look at the statutes and the decisions upon this subject, it is impossible to deny them the right to come into the federal tribunal, even after they have taken their chance of a favorable verdict in the common pleas.*" (Italics ours.)

The result was that, though terms were imposed, the court acknowledged the right of the petitioner to invoke the special proceeding in admiralty, notwithstanding but one claim existed. In so doing Judge McPherson expressly followed

Quinlan v. Pew, supra,

of which he said:

> "I cannot avoid the conclusion that the circuit court of appeals for the first circuit was right in deciding (Quinlan v. Pew, 5 C. C. A. 438, 56 Fed. 111) that a state court does not possess the machinery fully to administer the act of congress, even in cases where there is only one claimant. It may be (although I do not decide the point) that a state court is a 'court of competent jurisdiction,' within the meaning of section 4285 of the Revised Statutes, and may therefore have power to appoint a trustee under that section. But, even if this be true, a state court has no power to appraise the vessel under rule 54 in admiralty, or to carry out the other provisions there to be found, and these provisions are now as much a part of the right as is the statutory direction concerning the appointment of a trustee. If the state court has no power to appoint a trustee, this furnishes a second reason for upholding the owner's right to apply to a court of admiralty."

It is apparent that, while following *Quinlan v. Pew,* the court reached a like conclusion by independent reasoning, which compelled him to hold that the common law could not furnish the remedy for limitation of liability prescribed by the terms of the statutes creating the right, and the rules of procedure formulated by the Supreme Court to carry the statute into effect.

It is to be noted that in this respect the court was not in accord with Judge Brown, although the latter's opinion was not mentioned, notwithstanding it must have been before the court, as *The Rosa*, supra, was of seven years' earlier date.

In

The M. Moran, 107 Fed. 526,

where but one claim for loss of a dredge was presented, although the petition alleged the possibility of other claims, Judge Thomas, of the District Court for the Eastern District of New York, distinguished *The Rosa* by the fact that in the latter there were no averments of the possibility of other claims, and the nature of the liability against which limitation was sought, showed that there could be no others. Judge Thomas, however, frankly said that, if the facts in the case before him were similar to those in *The Rosa,* the later would not be easily disregarded, notwithstanding a contrary holding by the Circuit Court of Appeals in *Quinlan v. Pew.*

But in 1903, when the question again came before Judge Thomas in

In re Starin, 124 Fed. 101,

he held, without discussion, that the court had the right to entertain the special proceedings for limitation, although the history of the litigation showed that a single claim for injuries received by the breaking of a cleat had been prosecuted to judgment in the lower court, and appealed through all of the appellate courts of New York. The contention made was that

the failure to interpose the defense in the state court had constituted a waiver of the defense. This, Judge Thomas expressly disaffirmed, and sustained the right of the petitioner to proceed for limitation in the District Court.

The doctrine of *The Rosa* was disaffirmed in

The Hoffmans, 171 Fed. 455,

decided by District Judge Adams, the successor of Judge Brown, in the Southern District of New York. He treated the question with great fullness, exhaustively reviewing and comparing the various decisions to that time. He pointed out that notwithstanding the rulings of Judge Brown in *The Rosa* and *The Eureka No. 32*, the case of *Quinlan v. Pew* had come to be generally followed, even in the Southern District of New York. His personal opinion, apparently aside from the precedent of the prevailing practice, was that the reasoning of the Circuit Court of Appeals in *Quinlan v. Pew,* and the result there reached, was more consonant with sound maritime principles than the contrary views expressed. While recognizing that proceedings in a state court often suffice to give an opportunity to present the defense of limitation of liability, by way of answer, Judge Adams pointed out that such proceeding was manifestly useless when anything in the nature of affirmative relief was necessary. If the owner desired to proceed affirmatively, the proceeding in the District Court provided by the Revised Statutes and the Supreme Court rules alone offered relief. He was also of the opinion that if there was more than one forum in which the shipowner could

obtain relief under the statute, the right of selection would seem to rest with him. From the fact that it had been well settled that a shipowner could resort to the special proceedings in a District Court at any time before satisfaction of judgment, even if the question of liability has been fully litigated in the state courts, as recognized in

The Benefactor, 103 U. S. 239; 26 L. ed. 351,

Judge Adams concluded:

> "If vessel owners can finally resort to the District Court to obtain the benefits of the act, it is difficult to see why they are not entitled to at the outset and it seems unjust to require them to determine in the beginning whether or not there is more than one claim. The machinery of the court affords the only adequate method of legally determining that fact and though it may turn out that there was but one outstanding claim and there may be some incidental hardship to a claimant, that seems to me no sufficient reason for depriving a vessel owner of his statutory right."

From the foregoing review of the cases, it appears that the weight of authority and later day practice unquestionably upholds the right of the admiralty courts to entertain a proceeding for limitation of liability where there is but one claim, on which suit may have been already brought in a common law court. One Circuit Court of Appeals' decision, and the only one discussing the question, supports it, while the Circuit Court of Appeals for the Second Circuit impliedly upheld the doctrine, when it ordered a right of limitation in

The Tommy, 151 Fed. 520,

where there was but one claim possible. The Eastern District of Pennsylvania has followed the rule since it first came before it, as has the Eastern District of New York, and while Judge Brown, of the Southern District of New York, held a contrary view so long as he presided over that court, for he reaffirmed *The Rosa* in *The Eureka No. 32,* yet his successor, Judge Adams, not only disagreed with him as to the correctness of the former's conclusion in *The Rosa,* but the practice in that district ever since appears to have been in recognition of the right to the special proceeding.

Such is also the practice of the District Court for the Northern District of California, for Judge De Haven, in

The Ocean Spray, 117 Fed. 971,

upheld the jurisdiction by entering a decree of nonliability on the merits, where the liability against which the limitation proceedings were instituted was of such a character as to give rise to but one claim, on which suit had already been brought in the state courts, but which at the time of the commencement of the limitation proceeding, was pending for a new trial after reversal by the Supreme Court of a verdict and judgment for $2,000 rendered on the first trial.

Appellant's petition (apostles p. 8) does not aver that no other claim than that of the Hammond Lumber Company did not exist, nor was the nature of the casualty upon which that claim is founded such as to preclude other claims, as in the case of a single

personal injury, which gave rise to *The Rosa* and *The Eureka No. 32*. Rather was it of the class which Judge Brown recognized in *The Eureka No. 32* to be an exception to his ruling, when he said:

> "Where suit has been brought upon one claim and the circumstances are such as to make probable the existence of other claims arising out of the same accident, as in cases of collision, or from any other circumstances of the same voyage, sections 4284 and 4285 may no doubt be rightly invoked and proceedings thereunder instituted for a pro rata distribution."

So far as the petition discloses, numerous claims might have arisen on the voyage, or resulted from the breaking up of the raft, if it were the result of negligence, and yet, unless the nature of the accident makes impossible the existence of other claims, or the petition expressly shows no other claim, even the rule of *The Eureka No. 32* will not apply.

Again, the cases against the right to invoke the special proceeding, where but one claim exists, are all predicated upon the saving clause of the Judiciary Act of 1789. If, for any reason, the state court, in which the prior action may have been instituted is not able to give the owner, by way of a common law remedy, all the relief provided by the federal statutes and the rules of the Supreme Court, then those decisions do not sanction the withholding of the proceeding.

If, for instance, the right to limitation is questioned, that controversy is one solely of admiralty cognizance and cannot be adjudicated in a common law action.

This is clearly pointed out in *The Lotta,* supra, wherein the court said:

> "The act of 1851 and the rules of the Supreme Court passed to carry it into effect confer on the District Court jurisdiction to determine whether the case is one of limited liability. *This is a question of admiralty and maritime jurisdiction which must be determined by the courts of the United States,* and the decision upon the question of the injunction is predicated upon the assumption that that question is not involved in the suit in the state court, and that the only questions to be decided there are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of defendant's liability."

Appellee, in its answer to the petition, not only expressly denied the right of appellant to a limitation of its liability, but prayed that the court "deny the said limitation." (Apostles pp. 87, 89.) An issue was thus presented which can only be determined by the courts of the United States in the special proceeding.

It was admitted by Judge Brown in *The Eureka No. 32,* supra, that a common law remedy, through which the state courts have alone power to act in cases of admiralty and maritime jurisdiction, does not include the equitable powers for the appointment of a trustee. And yet the statute granting the limitation expressly provides for the transfer of the interest of an owner in a vessel to a trustee. (Sec. 4285, Rev. St.) If the statute is to be given full force and effect, how then could appellant's right to proceed in the District Court have been denied, if, instead of giving a stipulation

for value, it had actually transferred its interest to a trustee appointed by the court? It had the right so to do, or the statute is ineffective. Instead, it had due appraisement made and gave the required stipulations for value as permitted by the Supreme Court rules (Rule 54). Inasmuch as the rules do not derogate from the statutes, but supplement them by providing the machinery of the law by which they are to be carried into effect, appellant stands in the same position as though it had surrendered its interests to a trustee.

Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 600; 27 L. ed. 1038, 1046.

So long, therefore, as appellant proceeded affirmatively, it is undeniable that the common law was inadequate to give it the statutory relief to which it was entitled. The right is not, and cannot be, conditioned upon the number of claims which may be presented in the proceeding, but arises not only from the express grant of the federal statutes, but from the incompetency of the common law to afford the relief.

The S. A. McCaulley, supra.

The foregoing authorities, to which others might be added if necessity required, show it to be a settled rule of law that the district court has the right to entertain the special proceeding when only one claim has been presented.

Appellant is afforded no protection by the action of the lower court in dismissing the petition as to appellee and retaining it for all other proceedings, for it is clear that if the proceedings were properly instituted, and

the procedure prescribed by the rules properly followed, any subsequent event, such as the presentation of only one claim, would not deprive appellant of the undeniable right to limit its liability as accorded by the statutes and the Supreme Court rules. If any other result were possible, it would then be necessary for a shipowner to wait, in uncertainty, until such time had elapsed as would make positive the fact that more than one claim would be presented—a condition not only inconsistent with a fair interpretation of the statutes, but one concerning which Judge Adams, in *The Hoffmans,* supra, said:

> "it seems unjust to require them to determine in the beginning whether or not there is more than one claim".

By weight of authority and reason, then, the lower court's decree, dismissing the petition of appellant, because only one claim had been presented, was erroneous.

II.

THE DISTRICT COURT ERRED IN HOLDING, WITHOUT A TRIAL UPON THE MERITS, THAT BOTH TUGS WERE EQUALLY LIABLE, IF LIABILITY EXISTED AT ALL, AND MUST BE SURRENDERED, AND IN DISMISSING THE PROCEEDING AS TO APPELLEE BECAUSE THE COMBINED VALUES OF BOTH TUGS EXCEEDED THE ONE CLAIM PRESENTED PURSUANT TO THE MONITION. (Specifications II, III and IV.)

The question thus presented is whether or not the fact that both tugs were engaged in the towage service requires the surrender of both tugs to a trustee, or in

lieu thereof, the giving of a stipulation for their values, as a condition to the right of limitation of liability. Inasmuch as the statute limits the liability of the owner of any vessel to the amount or value of the interest of such owner in the vessel, and her freight then pending, for any act, matter or thing, lost (loss), damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner (Rev. St. Sec. 4283), the question is one as to what is meant by the vessel, within the purview of the statute. The lower court held that:

> "Both tugs being engaged in the same venture at the time of the disaster, are equally liable, if there is liability at all, though the tug 'Dauntless' was the only one attached directly to the raft." (Ap. p. 119.)

It thus, without a hearing, determined that both tugs were equally liable *because engaged in the same venture.* The indirect effect of the ruling was to hold that the *matter of liability* for the loss was the criterion by which the necessity of surrender is to be determined.

The latter test, thus applied, was not out of accord with the settled rule. But instead of proceeding to a hearing by which the question of liability could have been determined, the court concluded, as a matter of law, that both tugs were liable because engaged in the same venture. It thus made the direct test which it applied, *that of engaging in the same venture, rather than that of liability.* This, we contend, is not supported either by reason or by weight of authority, for in every case, so far as we are aware, the courts

have addressed themselves to the determination, from evidence adduced, of the identity of the offending vessel. If the court had proceeded to a hearing and then found that both tugs had negligently brought about the loss of the raft so that they could have been held responsible therefor *in rem,* then, by reason of common ownership, appellant would have been required to respond for their combined values; but if only the "Dauntless" was in fault, if liability existed at all, surrender of that vessel alone would have been required, or a stipulation for her value given in lieu thereof. The fact that both tugs were engaged in the same venture, without regard to the question as to the fault of which, if any, caused the loss, is not the test of liability.

The first reported decision on this general subject is that in

The Arturo, 6 Fed. 308,

a case in which two tugs belonging to different owners were employed in towing a barkentine, one on each quarter. While so engaged, the barkentine became stranded, thereby causing the loss complained of. Both tugs were held responsible because their joint action caused the stranding. Though both were engaged in the same venture, the court recognized the possibility of a separate liability for the negligence of one. This clearly appears from the following excerpts from the opinion:

> "If, therefore, one tug was wholly in fault, as by a defect of her machinery, or the like, she alone would be responsible. * * * I have taken for granted that there might be a still further relaxation as to any fault distinctly committed by one of them only * * *."

In the case of

The Bordentown, 40 Fed. 682,

a petition for limitation of liability was filed by the Pennsylvania Railroad Company, owner of the three tugs, "Bordentown", "Winnie" and "Willie". The tow left the port of South Amboy in charge of the "Willie" and "Winnie". Shortly afterward the tug "Bordentown" took charge of the fleet of canal boats in tow, and later the "Willie" was detached. The tug "Winnie" acted as a helper and was under the *charge and command of the master of the fleet,* who was on board of the "Bordentown". On the voyage a heavy sea was encountered, with the result that all but one of the canal boats were lost.

The court held the petitioner liable for the loss and extended its liability to the value of the tugs "Bordentown" and "Winnie", because of the fact that the real fault was committed in taking the tow out into the bay under circumstances which the tow was wholly unfit to encounter. This was the act of the master of the "Bordentown", and at the time his fault arose, the "Winnie" was as much a part of the moving power as the "Bordentown", *and was equally under the same direction of the master.* The fault was common to both vessels. This was clearly pointed out by the court when it said:

> "I think the petitioners are, therefore, liable for the imprudent and negligent navigation of their employees in taking the tow out into the bay under circumstances which the tow was wholly unfit to encounter. * * * The real fault was in bringing

> the tow into that situation. * * * At the time when the *master's* fault arose, the 'Winnie' was as much a part of the moving power as the 'Bordentown', and was equally under the same direction."

That the fact of joint service is not alone the test, but that the fault must be one which can be attributed to one standing in actual relationship to the operation of both vessels, and not to one alone, was expressly recognized by Judge Brown when he said:

> "Where all the tugs employed belong to the same owner, *and are under one common direction,* and are engaged in the service at the time when the fault is committed, they are in the same situation, as it seems to me, as a single vessel, *as respects responsibility for the negligence of the common head."* (Italics ours.)

The question of limitation of liability was thus predicated upon the actual fault producing the loss, and that fault was not determined by the fact that both vessels were engaged in the same venture.

Such, we understand, to be the ruling of this court in

The Columbia, 73 Fed. 226.

There the question was not one of liability of two or more tugs to their tow, but of a tug and barge to a member and representatives of members of the crew of the tug, and to the owner of the barge's cargo. The injuries, deaths, and damage to cargo resulted from the sudden listing of the barge while an attempt was being made to temporarily repair a leak which resulted from the tug negligently bringing the barge into collision with a wharf at Astoria. After separate actions had been commenced by the claimants, limitation of lia-

bility proceedings were instituted by the owner and lessee of the barge, and the question arose as to whether the barge alone, or both tug and barge had to be surrendered. The court below held that the barge alone was required to be surrendered, on the theory that the proximate cause of the loss and damage was the collapsing of the barge, due to the negligent shifting of sacks of wheat by the master of the barge. On appeal, this court reversed the district court, and held that both tug and barge must be surrendered to obtain a limitation of liability.

The court said:

> "In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage, both were necessarily under the control of the master of the tug. They constituted the instrument of carriage, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due performance of the contract of carriage. The case shows that the tug, having the barge loaded with wheat in tow, left Portland about one o'clock in the afternoon of October 21, 1892, and reached Astoria about 12 o'clock that night. Notwithstanding there is nothing in the case to show that the contract of carriage contemplated the landing of the wheat at Astoria, or the tying up of the barge at the dock at that place, but, on the contrary, the delivery of the wheat from the barge to the ship Westgate, yet the tug—due, probably, to the late hour of arrival—undertook to tie up at the dock, and, in doing so, carelessly ran the barge against the piles of the dock, and with such force as to knock a hole in her stem, thereby causing a serious leak. The master of the tug continued, after the accident, to exercise control over the barge, as well as the tug, changed its position, put the engineer of the tug at work

with a siphon to pump the water out of the barge, and himself went, with one of the deck hands of the tug, into the hold of the barge for the purpose of building a bulkhead to guard against the water, and was so engaged when, about two hours after the accident, the barge collapsed, causing the death of the master and deck hand of the tug, the injury to Boyce, a deck hand of the barge, and the loss of the wheat of Balfour, Guthrie & Co.

"The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable."

It is clear from the reasoning of the court and the authorities which it cited that it was determining the question of liability of tug and barge *to third parties* as an instrument in performing a contract of carriage for the voyage, and that it was not laying down a rule which would hold two or more tugs liable for the loss of a tow, simply because they were engaged in a common service, irrespective of what might be the proximate cause of the loss. Unquestionably, the Supreme Court in *The Northern Belle* and *The Keokuk,* cited, held steamers and barges to be as a single vessel when lashed together and under common command, and dependent upon the steamer's motive power. In *Sturgis v. Boyer,* cited, the court pointed out the circumstances

under which tug and tow might be jointly, or each severally liable, depending upon the question of control over the vessels. But in all of those cases, the question was one of responsibility to third parties, and not one of liability between two or more tugs and a common tow.

In holding that the question of proximate cause of the loss did not arise in the case,

> "for the reason that the tug and tow are, in law, considered as one vessel for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it is liable,"

the court was unquestionably enunciating a proposition of law having application solely to the contractual obligation of a carrier to the shipper of cargo, and was not intending to hold that the fact that two tugs, of common ownership, were engaged in joint towage, rendered them equally liable, irrespective of whether the negligence of one or both was the proximate cause of an injury to the tow. Certainly the two cases bear no resemblance to each other.

If the fact of joint service always meant joint liability, then the Supreme Court's decision in

The Connecticut, 103 U. S. 710; 26 L. ed. 467,

was wrong, for then both the "Stevens" and the "Connecticut" should have been held liable *in rem* to their tow, for liability *in rem* is independent of the question of common ownership. The court did not so rule, however, but determined the question of liability as one

of proximate fault. It may be, as suggested in *The Bordentown,* supra, that if there had been common ownership, *under a single directing master, whose fault caused the loss,* the case would have fallen within the rule of *The Bordentown.* But the very suggestion of Judge Brown points to the necessity of a *fault common to both vessels, not joint service,* as the proximate cause of a loss.

It necessarily follows that *The Columbia* is not an authority in support of the decree.

That the ruling in *The Columbia,* supra, is to be confined to the question of the contractural obligation of a carrier to its cargo owner, is illustrated by the fact that in

Van Eyken v. Erie R. Co., 117 Fed. 712,

the court, in determining whether a tug and barge, or tug alone, should be surrendered in a limitation proceeding to answer for damages done by the barge through the negligence of the tug, ordered the surrender of the tug because it was the one which committed the wrongful act, although the tug and barge there were as much a "united instrument" as the "Oklahoma" and her barge in *The Columbia.* It was not the fact that both were of common ownership and engaged in the same venture, which formed the test, but the court determined the necessity of surrender by ascertaining the vessel committing the wrongful act which constituted the proximate cause of the loss, irrespective of the fact of joint service. This appears from the following excerpt from the opinion:

> "The remaining question relates to the necessity of surrendering barge No. 9 in addition to the tug.

> The libelant suggests this upon the theory that the barges and tug 'formed a common united instrument of commerce, moving as an entirety, when the tort was committed, although afterwards separated in the successive collisions.' The Bordentown (D. C., 1889), 40 Fed. 682; The Columbia (1896), 19 C. C. A. 436, 73 Fed. 226. Generally, in collisions the tug has been regarded as the responsible actor. In the present case the proximate cause of the injury was the disordered steering gear, and in rem the tug alone would be liable. The fact that the defective condition of the tug enabled her tow to collide with the pier, and become detached, and injure another vessel, did not make the presence or movement of the tow a primary agent in effecting the injury. The presence of the barges was a part of the condition under which the wrongful act or omission took effect. It was not a part of the wrongful act. Therefore it is concluded that the respondent may limit its liability upon surrendering the tug."

The tug alone was required to be surrendered because it was solely liable *in rem* for the fault.

Later, in

The Anthracite, 162 Fed. 384,

Judge Adams of the District Court of the Southern District of New York, held two tugs, jointly engaged in a towing service, liable because of the fact that the master of the "Anthracite" had charge of the navigation of his tug and of the "Cleary". The question of liability was again determined by that of the proximate cause of the damage, and the case in the court's opinion, was within the ruling in *The Arturo,* supra, because their joint action through the directing mind of the master of the "Anthracite" conduced to the loss.

The decision was affirmed in 168 Fed. 693, the court pointing out that both tugs should be condemned *because both were in fault.* Circuit Judge Lacombe said:

> "The fault was in steering, rounding to so carelessly as to bring the tow against the rock. The master of the Anthracite directed the steering, and the master of the Cleary submitted herself entirely to his commands. There was no independent action. In the steering both participated."

The principle of this case was followed in

The Defender, 208 Fed. 836,

where the tug alone was held responsible, and the launch, though assisting in the tow, was exonerated because she was without actual fault.

The Circuit Court of Appeals for the Second Circuit again had the question before it in

The Sunbeam, 196 Fed. 468,

where the *element of fault again was the keynote* of a discussion as to the necessity of a surrender of one or more vessels. To compel a surrender of a number of vessels in a proceeding of this kind, the court said:

> "They must be shown to be guilty of a fault that caused or contributed to the accident."

The petitioner's liability was, therefore, limited to the value of the scow "Sunbeam", the vessel in fault.

The question was examined with great care by the Circuit Court of Appeals for the Second Circuit in

The W. G. Mason, 142 Fed. 913,

and the decision of the District Court, holding that two tugs of common ownership, engaged in a joint towage,

must be surrendered, was reversed. The Court of Appeals held that but one tug was required to be surrendered because of the fact that *that tug was alone in fault.* The damage to the steamer "Gratwick" resulted from the negligence of the tug "Mason" at her bow, while the steamer was being turned around the end of a breakwater in Buffalo harbor, and was not contributed to by the tug "Babcock", assisting at the steamer's stern. In the course of its opinion, the court, speaking through Circuit Judge Wallace, exhaustively reviewed all of the decisions to that date, bearing upon the question, and expressly pointed out that the surrender of two vessels, engaged in joint service, had been required only because of the fact that both were in fault. Where such liability did not exist because of the absence of actual fault on the part of both, as in *Van Eyken v. Erie R. Co.,* supra, liability was limited to the value of the one in fault.

It was pointed out that the fault of both vessels belonging to the same owner did not affect the question of liability *in rem,* because such liability was independent of the personal liability of the owner and that the question of the obligation of an owner to surrender a vessel was predicated upon the liability *in rem* of the vessels for their fault.

The test thus applied was that of determining the actual fault, and was not conditioned upon the sole facts of common ownership and joint service. The decision is so to the point that we quote the court's conclusions:

> "A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of

navigation for preventing collisions; but it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves, or their several liabilities to respond for the consequences of a fault of one of them. Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault. The James Gray v. The John Frazer, 21 How. 184, 16 L. ed. 106; Sturgis v. Boyer, 24 How. 110, 16 L. ed. 591; The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236.

"The cause of action here is not one for the breach of a maritime contract of towage; but it is for the breach of a duty imposed by the law, independently of contract or consideration, and is therefore founded in tort. The Quickstep, 9 Wall. 665, 19 L. ed. 767; The Syracuse, 12 Wall. 167, 20 L. ed. 382. In The John C. Stephens, 170 U. S. 125, 18 Sup. Ct. 549, 42 L. ed. 969, the Supreme Court said:

" 'This court, more than once, has directly affirmed that a suit by the owner of a tow against her tug to recover for an injury to the tow for negligence on the part of the tug is a suit ex delicto and not ex contractu.'

"If the liability of the owner for the tort or wrong of a vessel, arising from the misconduct, or negligence of her master, or crew, could be enforced against another vessel belonging to the same owner, whenever she might happen to be engaged in the same enterprise with the other vessel though acting in an independent capacity, and under the control of her own master and crew, in performing her part of it, the spirit and meaning of the statute limiting the liabilities of vessel owners would be disregarded. The statute incorporates into the law of this country the rule of liability which was administered as a part of the general maritime law by the courts of continental Europe, and was adopted in England by the acts of 26 and

> 53 George III, and by which the liability of the owner for all torts of the master and seamen in charge of the navigation of his ship was limited to the value of his ship and freight. For the promotion of commerce, and to protect those who invest their money in ships from hazard of losing the rest of their property through the fault of those to whom they are obliged to entrust the navigation, the statute limits their liability for the faults of navigation of a particular ship to the amount invested in that ship, provided they have not had any personal participation in these faults. 'It limits the shipowner's liability in three classes of damage or wrong happening without their privity, and by the fault or neglect of the master or other person on board.' Norwich Co. v. Wright, 13 Wall. 104, 121, 20 L. ed. 585. To subject both vessels in a case like the present to liability in rem would make the owner responsible for a fault committed without his privity or knowledge beyond the value of the ship in fault.''

The decision was thus contrary to the ruling of the lower court in the instant case, that both vessels were equally liable because engaged in the same venture. They are liable, under the authority of the case, *only if in fault,* irrespective of ownership or joint service, and are not liable because engaged in the same venture. And, as was impliedly admitted by Judge Dooling, surrender of both, or stipulations for value, could only be required if liability existed. The error of the lower court was in its assumption of a false premise as to the extent of liability.

Nor was there anything in the ruling in the subsequent case of

> *Thompson Towing & Wrecking Ass'n v. McGregor, et al.,* 207 Fed. 209,

inconsistent with the principle enunciated in *The W. G. Mason,* supra.

In that case it appeared that the lighter "Stewart", and several other vessels belonging to petitioner, were engaged in releasing the steamer "Elwood" from a stranding in Mud Lake, an arm of Lake Huron, and that during the course of operations, the boiler of the "Stewart" exploded, causing the injury and death of two workmen on board the lighter. The evidence adduced conclusively showed that the proximate cause of accident was the defective condition of the boiler, and that the local manager of petitioner dispatched the vessels, at least charged with knowledge of the condition of the boiler.

The question arose as to what vessels should be surrendered in the limitation proceeding, the claimants insisting upon all of the vessels engaged in the work, and petitioner that of the lighter alone. The court held, however, that the lighter "Stewart" and tug "Merrick" should have been included in the original surrender.

From the District Court's opinion, a portion of which was adopted by the Court of Appeals in its decision, it is certain that the master of the "Merrick" directed and controlled the every movement and work of the lighter, a vessel without any motive power whatever, and dependent upon the assistance of the "Merrick". At the time of the accident they were found to have been actually attached to each other through the "Elwood". *The proximate cause of the loss was, therefore, the negligent act of the manager in common control over the two vessels, actually attached to each other,*

and engaged in the same service, and both vessels were required to be surrendered because of the fault thus attributable to both.

The District Court distinctly pointed out that, but for the fault common to both, the surrender of the one in fault would only have been required. It was stated by Judge Dennison:

> "The situation would be different if the negligent act which is to condemn the particular, guilty rem had been the independent act of an agent who had to do with the Stewart only (as in The Mason and similar cases). Here, however, the damage(d) claimant(s) count upon the negligence of the agent in charge of both boats who equipped and sent out the defective boiler as a part of the working unit, and the damage happened at a moment when these possibly separable parts were in fact united."

The question of fault is thus held to be the foundation of liability, and, therefore, of surrender. It could not have been more pointedly stated than by Circuit Judge Warrington, when he said of the refusal of the lower court to hold any of the vessels but the "Merrick" and the "Stewart":

> "The eliminating processes of the trial court do more than to illustrate the error of the criticism made of the decision. *They point out the necessity of studying the facts not only of the case in hand, but also of the cases cited and relied on as precedents, for the purpose of identifying in each instance the offending thing,* whether that be a single or a composite instrumentality. (Italics ours.)

In all of the cases, it thus clearly appears that the courts have laid responsibility and the necessity of sur-

render upon the element of fault, and, in each case, before designating the vessels to be surrendered, have pointed out the specific fault from which liability resulted. In none of them has the bold rule been promulgated, holding that two vessels, attached together, must be surrendered irrespective of the question as to whether they were both, or only one, in actual fault; nor have any of the courts intimated that the fault to one was to be attributed to another vessel attached to the former, simply from the fact of such attachment, common ownership and joint service. *The constant test has been that of fault, and not that fault follows to one from the fact that she may be commonly owned and engaged in the same venture with another, attached to her, actually committing the fault.* Unless, therefore, this court shall adopt a rule by which two tugs, attached to each other, and engaged in common service, are, for those reasons, liable for faults of each other, the decree of the lower court in so holding was erroneous.

But such a rule would contravene the principles by which the Supreme Court exonerated the "Stevens" from liability in *The Connecticut* and *The S. A. Stevens,* supra. Until liability for the wrong is determined, the matter of common ownership is of no importance upon the question of surrender. The Limited Liability Act does not require surrender because of common ownership, but, because of an existing fault, does require the owner to surrender his interest in the vessel, or vessels, actually in fault.

With the question of the necessity of petitioner surrendering the tugs "Dauntless" and the "Hercules" dependent upon that of the fault of both tugs, the lower court could not, without a hearing, determine that both were responsible for the loss, for the reason that the liability of both tugs, and particularly that of the "Hercules", was put in issue by the petition and answer.

III.

THE DISTRICT COURT ERRED IN NOT PROCEEDING TO A TRIAL UPON THE MERITS. (Specifications II, III and IV.)

If the question of the necessity of surrendering both vessels is conditioned upon the fact of fault being attributable to both, as all of the reported cases bearing upon the subject hold, then the lower court should have proceeded to a hearing upon the question of fault. Instead, it determined, as a matter of law, that the "Hercules" was in fault because engaged in the same venture with the "Dauntless". If the court's ruling could, by any chance, be correct, then it means that appellant is to be forever foreclosed from producing proof in denial of the alleged fault of the "Hercules", as it must follow, as a necessary conclusion from the premise upon which the lower court proceeded, that appellant would have no more right to adduce proof and litigate the question in the state court than it had in the District Court. If the District Court could say, as a matter of law, because of common ownership and joint service, that the "Hercules" is equally in

fault with the "Dauntless", if fault on the part of the latter existed, then the state court has equal power to so hold. The result would be that whatever the fault of the "Dauntless" which may have caused the loss, the non-participation of the "Hercules" in such fault would not be open to question. Suppose, for instance, that the loss of the raft was due to some act of a member of the crew of the "Dauntless", entirely disconnected from the "Hercules", it certainly would not be urged that, under those circumstances, the "Hercules" would be liable, for the fault would not be common to the two tugs. To hold her so would be inconsistent with the ruling of the Supreme Court in *The Connecticut* and *The S. A. Stevens,* supra. The fact that the tugs were towing tandem would not involve the "Hercules" in liability for the supposed fault, any more than the fact of the "Stevens" and the "Connecticut" being made fast to the tows, rendered the former liable for the negligence of the latter. Liability is not conditioned upon the method of the vessels being attached to each other, even in cases where there is fault attributable to both, as illustrated by the different ways in which the "Bordentown" and "Winnie", and "Stewart" and "Merrick" were attached to each other.

The Bordentown, supra.

Thompson Towing & W. Co. v. McGregor, supra.

And if the "Hercules", under the supposed case, could not be held in fault for the negligence of a member of the crew of the "Dauntless", then appellant

would not be compelled to surrender her, or respond for her value.

The W. G. Mason, supra.

That there may be separable negligence in the case of a joint towage service is shown by the remarks of Circuit Judge Lowell in *The Arturo,* supra, wherein he said:

> "If, therefore, one tug was wholly in fault, as by a defect of her machinery, or the like, she alone would be responsible. But for their joint action, so far as it conduced to the loss, I hold them to be jointly responsible."

The W. G. Mason, supra.

The Defender, supra.

The possibility of separate negligence is, perhaps, best illustrated by the case of

The Hercules, 81 Fed. 218,

wherein Judge Morrow held that one of the questions to be determined from the issues made up was:

> "Whether the stranding of the ship 'Packard' arose or was caused by any negligence on the part of both tugs, or either of them, in towing the ship."

The case was one in which not only was the right of limitation denied, but in which the question of the fault of the tug "Sea Queen" was involved with that of the tug "Hercules", in an alleged joint towage service. The fact that the court considered the question of the alleged faults of the two tugs for the purpose of determining whether petitioner was required to answer for the value of one, or both, demonstrates that

faults may be separable in a common service as between two tugs of same ownership.

Inasmuch as the fault must be mutual to the "Dauntless" and "Hercules" to require appellant to respond for the value of both, the state court, if it were to administer the statutory limitation of liability, would have to make inquiry into the subject of the alleged respective faults. Otherwise, if a fault were shown on the part of the "Dauntless", which, in fact, was not common to the "Hercules", appellant would be deprived of its rights under the Limited Liability Act. And if the state court would be required to adduce proof upon the question, the District Court should have done so, for it could not properly determine, as a matter of law, that a common fault existed simply because of the fact that the tugs were engaged in the same service.

If proof were taken by the District Court and the evidence showed that the "Hercules" was without fault contributing to the loss of the raft, then, inasmuch as the appraised value of the "Dauntless" was less than the value of the raft, the value of the vessel required to be surrendered, assuming that the "Dauntless" was found in fault, would be less than the one claim presented, and hence a case that came within every requirement of the law for invoking the right of limitation of liability in the District Court.

It thus is manifest beyond all doubt that the District Court should have proceeded to a hearing for determining the question of fault on the part of the respective tugs. The issues framed by the petition, and claim and answer, and objections and answer to the claim, ex-

pressly included the question of the fault of the tugs, severally and jointly. Had, therefore, the cause gone to trial upon the pleadings, the question of appellant's right to a limitation of liability as granted by the statutes and Supreme Court rules would have been fully determined.

How is appellant to obtain its statutory rights of limitation of liability, if it is relegated to the state court on the theory that the limitation can as well be granted there as in the District Court, when appellee denies, as it has done in its answer to petition, appellant's right to any limitation, for it has been held that the question of the right of limitation is one of exclusive cognizance with the courts of the United States?

The Lotta, supra.

The denial of the right of limitation forecloses the common law court from going into the question, for that court would be concerned alone with the question of appellant's liability arising from the alleged fault of the tugs, irrespective of whether it was that of the "Dauntless" or the "Hercules". A verdict of the jury would not determine which of the tugs was at fault, or its nature, but would simply be, if liability on the part of the owner was found to exist, for a fixed sum of money damages. Such an award would be of no assistance to the District Court when it came again to examine the question as to which of the two tugs was in fault, and thus the question of fault would have to be tried anew, or appellant's statutory rights denied to it.

Under all of the circumstances, therefore, we respectfully submit that appellant was within its right in presenting its petition for limitation of liability to the District Court and that the court erred in dismissing the petition as to appellee.

We respectfully ask that the decree of the court below be reversed, with instructions to proceed to a trial on the issues made by the pleadings, in accordance with rules and practice in limitation of liability proceedings provided.

Dated, San Francisco,
May 16, 1914.

Respectfully submitted,
EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

In the Matter of the Petition of the Shipowners and Merchants' Tugboat Company (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules", for limitation of liability.

BRIEF ON BEHALF OF HAMMOND LUMBER COMPANY, CLAIMANT BELOW, APPELLEE.

This action was initiated by a petition for limitation of the liability of the Shipowners and Merchants' Tugboat Company, appellant, for the loss of a log raft valued at $71,249.90, belonging to the Hammond Lumber Company, the appellee. The District Court heard

the testimony as to the value of the two tugs which, in tandem, were towing the raft and found that it was $115,000.00. The petition for limitation does not allege that any person, other than the appellee, was damaged by the loss of the raft and subsequently a default against such other persons, if any, was decreed.

It further appears that prior to filing the petition the Lumber Company commenced a common law suit *in personam* against the Tug Company and that issue was joined and the case ready for trial. The basis of the Lumber Company's claim against the Tug Company was the negligent choice of the wrong channel out of the Columbia River for the tandem of tugs and the log raft, and the negligent concentration of the power of the two tugs on the towing machine of the latter, which was not strong enough to withstand the double strain.

The question then is: Did Congress intend to deprive appellee of its right to trial by jury in a common law court on an issue of negligence by a shipowner, whose combination of tugs forms a single instrumentality furnishing a united power along a single tow line to the raft, and necessarily steering on one and the same course, where the value of the combination is more than the damages claimed by the owners of the raft, the sole person injured?

Preliminarily let it be clearly understood that we are not urging that the court cannot limit liability because this is a case involving but a single claim. We do not contest the proposition of appellant's brief

laid down in the title of the first chapter and hence the discussion on pages 13 to 29 is beside the mark.

What we expect to establish is that:

1. Congress intended that there must be an excess of the one claim over the value of all which the owner has risked in the particular venture, to warrant taking the injured party from his common law court and depriving him of his right to trial by jury. If it appear that, although the petition be properly filed, the petitioner is not entitled to limitation on the facts of any claim, then the petition will be dismissed as to that claim and the case sent back to the State court;

2. This court has squarely decided that the owner, in order to obtain limitation, must surrender all he has at risk in the venture, during the course of which the injury is inflicted, regardless of the causal participancy in the wrong doing of any particular tug or vessel constituting a part of the venture;

3. Even if the doctrine of proximate causation be applied in determining the vessels to be surrendered, the Tug Company, if liable at all for the particular negligence charged, is liable for that negligence in the united operation of both tugs. *Res ipsa loquitur,* not necessarily of the negligence, but of the joint participancy of the tugs, and hence the necessity for surrender of both to obtain a limitation of liability for the negligence charged. The mere denial of such joint negligence places its existence in issue, but does not change its joint character.

I.

Congress intended that there must be an excess of the one claim over the value of all which the owner has risked in the particular venture, to warrant taking the injured party from his common law court and depriving him of his right to trial by jury. If it appear that, although the petition be properly filed, the petitioner is not entitled to limitation on the facts as to any claim, then the petition will be dismissed as to that claim and the case is sent back to the State court.

The Supreme Court has just passed on the long disputed question as to whether the limitation proceeding could be invoked where there is but one claim. In holding that Congress created such a right in the shipowner, the court clearly proceeds on the reasoning that it is the *limitation of his liability* which is the basis of the right. In that case the petition referred to an action pending in the State court for $21,350.87, and alleged that the value of the steamboat did not exceed $10,000. The court construes the provisions of the R. S. providing for limitation of liability and finds that, while they lend support to the theory that there must be a multiplicity of claims, they are controlled by section 4283, the section which provides for limitation. The court says:

> "But to a right understanding of these sections it is essential that they be read with § 4283 (U. S. Comp. Stat. 1901, p. 2943). It contains the fundamental provision on which the others turn. It broadly declares that 'the liability * * * for *any* * * * damage * * * occasioned with-

> out the privity or knowledge of such owner * * * shall *in no case* exceed' the value of the vessel and freight. The succeeding sections are in the nature of an appendix and relate to the proceedings by which the first is to be made effective."
>
> *White v. Island Transportation Co.* (April 13, 1914), 34 Sup. Ct. Rep. (Advance Sheets) 589, 591.

The next section, 4284, provides that where the

> "whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner in proportion to their respective losses".

Construing this with the preceding section, as suggested by the court, it must be apparent that if the fund or ship exceed the damage, there is no reason for the relief, certainly not if there is but one claim.

The case of *Richardson v. Harmon,* 222 U. S. 96, a single claim case relied upon by the Supreme Court in the White case, rests on a petition alleging:

> "That the damages claimed in the pending action at law were $35,000, and that they apprehended other actions of like kind, and if liable as claimed, the aggregate would greatly exceed the value of the interests of the owners in the vessel and her freight."
>
> *Richardson v. Harmon,* 222 U. S. 96 at 101.

Indeed, to hold otherwise than that the jurisdiction depended on the claim being less than the fund, would permit the shipowner in every case to defeat the State jurisdiction by simply filing a petition for limitation.

That is to say, if a laborer or a passenger on the steamer Mongolia, who was injured by falling down an unprotected hatch while in the port of San Francisco, should sue for $5,000 in a California court, a petition for limitation would deprive him of his pending suit and his right to a jury, although the bond in lieu of surrender of the vessel was for a million dollars.

So also, in a suit in the State court on a contract of maritime affreightment, a simple petition for limitation would oust the former's jurisdiction. In other words, the shipowner could force every case against him into admiralty, although when he, as plaintiff, had first chosen the State tribunal, the shipper, or passenger or officer whom he has sued must abide there with him. Certainly Congress did not intend that he should have this right for any other purpose than that of limitation.

The decision in *Quinlan v. Pew,* 56 Fed. 111, cited by the Supreme Court and our opponents, squarely rests its reasoning on the function of the court to limit liability. It says at the very page to which the Supreme Court cites it:

> "* * * if the owner of a vessel or wreck, under the circumstances of there being but a single claim outstanding, *large enough to absorb the entire vessel* or her salvage, could be compelled, on the verdict of a jury, to pay perhaps vastly more than her real value, or be forced to the trouble and expense of litigating any issue of that character." (Italics ours.)
>
> *Quinlan v. Pew,* 56 Fed. 111 at 120.

The same reasoning was invoked in *The Defender,* 201 Fed. 189 at 191, where the court says:

> "The proceeding is intended for the purpose of *limiting* liability, and this presupposes that the liability to be limited might exceed the limit; that is, that there might be personal liability beyond that of the res involved. *If the statute of limitations had run against all possible claims from any cause,* the situation on this present application might show plainly that there was no reason for the exercise of jurisdiction by this court. But where an accident, which by its nature, if caused by negligence, affected a flotilla of 15 boats, it would seem that the federal court should exercise its jurisdiction, in order that, if other suits should be brought and the liability amount to more than the value of the boat, the proceeding would not be too late to protect the owner." (Italics ours.)

The Defender, 201 Fed. 189, 191;

Delaware River Co. v. Amos, 179 Fed. 756.

This court has long since determined that the right of the shipowner to limit liability is an essential prerequisite to the right to adjudicate the claims and that as soon as it appears that there cannot be a limitation, the parties are allowed to return to their State tribunals, where their pending cases may be continued. In that case Judge Ross, speaking for the court, after finding that the petitioner was not entitled to limit liability, entered the following order:

> "The judgment is reversed and cause remanded, with directions to the court below to dismiss the petition at petitioner's cost, leaving the administratrix of the estate of the deceased, Weisshaar, at

liberty to pursue her action for damages in the state court.''

Weisshaar v. Kimball SS. Co., 128 Fed. 397 at 402.

This essential distinction between the right of the petitioner to come into admiralty to limit his liability, and the right of the injured party to keep his State trial and his jury unless the petitioner's right has been established, must be kept clearly in mind. The petitioner's right to stay in admiralty does not flow from his filing a petition in that court, but from his establishing from the facts that he comes within the Congressional privilege. This court has squarely held (144 Fed. 788, 796) that in so doing the burden of proof is on him, and not on the injured party.

Counsel urges that there might have been other claims, and that he is entitled to invoke the aid of the court to prevent a multiplicity of suits, but there is no such allegation in his petition. The mere fact that in his prayer for relief he asks that all other claims be enjoined of course tenders no issue upon the subject. If counsel relies on the possibility of other claims as establishing the quasi equitable jurisdiction of the court, even if the total is less than the fund, it must affirmatively appear in his petition. The court sitting in admiralty has a limited jurisdiction and no facts not appearing in the petition will be supplied by inference.

''' 'No presumptions arise in favor of the jurisdiction of the federal courts'. Ex parte Smith, 94 U. S. 455, 24 L. Ed. 165. On the contrary, the

> legal presumption is that every case is without their jurisdiction unless the contrary affirmatively appears. Robertson v. Cease, 97 U. S. 646, 649, 24 L. Ed. 1057; United States v. Southern Pacific R. Co. (C. C.), 49 Fed. 297. Said Marshall, C. J., in Brown v. Keene, 8 Pet. 112, 8 L Ed. 885:
>
> " 'The decisions of this court require that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.' "
>
> *Central Door & Lumber Co. v. California-Atlantic SS. Co.,* 206 Fed. 10 and 11.

However, even had the petition alleged a number of claims, the default against all claims save the Lumber Company's made it a one claim proceeding so far as limitation is concerned. It is like the case where all the other claims are barred by statute, instanced by Judge Chatfield in the excerpt from *The Defender,* supra.

We submit, therefore, that, following the reasoning in both the last Supreme Court case and the *Weisshaar* case, if both tugs are liable to surrender as component parts of the petitioner's venture, and there is nothing for the court to limit, as in any event the single claim will be paid in full, the right to continue in admiralty ceases.

In our next chapter we will show that the petitioner's interest in the venture consisted of his two tugs bound together so that they furnished their combined power over a single line to the log raft, and

which must pursue the same course in bringing it across the bar, and hence that the value of both must enter into the fund for limitation.

II.

This court has squarely decided that the owner, in order to obtain limitation, must surrender all he has at risk in the venture, during the course of which the injury is inflicted, regardless of the causal participancy in the wrong doing of any particular tug or vessel constituting a part of the venture.

Judge Ross' opinion in *Short v. The Columbia,* 73 Fed. 226, has finally settled this question for this circuit. In that case the appellants, Malvina Short and Sven Anderson, were the administratrix and administrator, respectively, of the estates of two of the men killed on the barge Columbia. The barge, on arriving at Portland, had been injured in docking, opening her up at her bow. Later she was moved into shallow water and while there the two men were engaged in building a bulkhead to shut off the leak. The barge suddenly collapsed on account of the shifting of her load by order of her captain, and before the men could escape certain sacks of grain fell on them and they were killed. The owner of the grain, some of which was injured, also appealed.

The barge had been towed by the tug Ocklahama which was nearby, waiting to take her on when the repairs were completed. The lower court held that

the collapsing was due solely to the shifting of the cargo under the orders of the barge captain, with which the tug had nothing to do, and that the barge alone should be appraised in fixing the limit of liability. One of the questions on the appeal was whether the tug should also be surrendered.

The owners of the tug and barge urged, just as petitioner here claims for the Hercules, that as no act of the tug could be called the proximate cause of the death of the men or the loss of the grain, her value should not be included in the fund for limitation. Judge Ross, in considering this contention, says:

> "The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the petitioners a limitation of liability without the surrender the tug Ocklahama, the court below was in error."
>
> *Short v. The Columbia,* 73 Fed. 226 at 238, 239.

We find it impossible to distinguish the Columbia from the case at bar. In both there is a contract of transportation, in both two instrumentalities were required for the transportation, in both it was claimed

that the faulty act of but one of the instruments was the sole cause of the injury, and that the value of the other should not constitute a part of the fund for limitation. In *The Columbia* it was squarely held that the acts of the tug had no causative relationship to the injury, as she was merely standing by. Surely the reasoning of that case applies *a fortiori* to the Hercules, who at the very moment of the loss was applying her full power to the other tug and through her to the raft. Wherever the locus of the negligence, the participancy of the tug in the venture, in the contract to tow the raft, could not be more indisputably vital.

We are unable to follow counsel's argument on page 35 of his brief, concerning the wheat on the Columbia as belonging to a third party. Surely as far as the contract of carriage was concerned, the owner of the wheat was the second party, and in the contracts of employment of the dead and injured men they were the second parties, just as in the contract of towage in this case, the Lumber Company was the second party. The Ocklahama's power to tow the wheat could only reach it through the barge, just as in the case at bar, the Hercules' power to tow could reach the raft only through the tug Dauntless. And here the Hercules was actually towing, while in the Columbia case, the Ocklahama was merely standing by!

It was not claimed in the Columbia decision that the agreement to transport the wheat created the status of common carrier. The obligation of the petitioner in each case is therefore the same. However, the nature of the contract as to the wheat could not affect the

decision, as the two claimants for the dead men were equally benefited. The only reason for looking into the contract is to determine what the venture was out of which the owner expected to reap his profit, and from that determine what the instrumentalities were that were engaged in it.

The fallacy underlying counsel's whole argument is this: He assumes that the ultimate factor in determining whether the value of a certain instrumentality in the venture should be included in the fund for limitation, is *whether it is itself liable in rem for the injury done.* How fallacious this is, is apparent from even a cursory glance at the decisions. For instance, in California, as in many States, a vessel is not liable *in rem* for injuries arising from the tortious killing of a person on another vessel, and yet the owner of the offending vessel can limit his liability *in personam* only by surrendering it.

The Dauntless, 129 Fed. 715.

In California the barge would not have been liable at all to any of the heirs of the deceased men, and yet even our opponent would not have the temerity to urge that it, at least, should not be surrendered.

As still stronger evidence that the liability of the vessel to the claimant has nothing to do with valuation of the fund, is the fact that in distribution of the fund no attention is paid to priorities. If the fund were simply a substitute for the ship those claimants having prior liens would take first, and if the lien claimants took the whole value, the persons without liens, such as loss of life claimants, supply men

in the home port, etc., would take nothing. Yet this court has held squarely to the contrary in a recent case where the death claimants were decreed to share *pro rata* with the cargo lien claimants.

Boston Ins. Co. v. Metropolitan Redwood Lumber Co., 197 Fed. 703 at 712.

Another illustration even more clearly shows that the liability of the ship *in rem,* is not the criterion of the size of the fund. It is elementary that the fund for limitation is determined at the end of the voyage and not at the moment when, say, the vessel in question rams another in the middle of the voyage, which she continues to her original destination. Suppose three vessels, A, B and C, each worth a million dollars: A is wrongfully rammed and sunk by the vessel B, which herself escapes unhurt. Suppose that thereafter on the same voyage B is herself wrongfully rammed by C, which also escapes, so that B's value is reduced to but $500,000 when she limps into her port of destination. If the owner of A libels B *in rem,* her owner bonds her for $500,000, her then value. If on the other hand, A's owner sues B's owner *in personam,* the latter, in order to limit liability, must not only surrender his vessel B, worth $500,000, but his claim against C and her owner, worth $500,000 more.

O'Brien v. Miller, 168 U. S. 306.

Now, there is not the slightest causal connection between C's wrongful act which gives B's owner a claim against him which in turn swells the fund for limitation, and B's wrongful act in ramming A, yet the Supreme Court compels B's owner to surrender

this personal asset arising out of the venture, if he would obtain the Congressional relief. Clearly the criterion for determining the size of the fund is not the liability of the vessel, but the owner's whole interest in the voyage and venture in which the injury occurred.

This brings us to a consideration of the words of the decision of the District Court:

> "The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where there are more claimants than one. Where there is but one claimant, however, and his claim is for much less than the amount to which, the liability of the shipowner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants. If the tug Hercules is equally liable with the tug Dauntless for the loss of the raft in question, we have the case here of a single claimant for an amount much less than that to which petitioner's liability may in any event be limited.
>
> "Both tugs being engaged *in the same venture,* at the time of the disaster, are equally liable, if there be liability at all, though the tug Dauntless was the only one attached directly to the raft."
>
> *The Columbia,* 73 Fed. 237;
>
> *Thompson Towing Co. v. M'Gregor,* 207 Fed. 212;
>
> *Apostles,* 118, 119.

That Judge Dooling uses the word "liable" here as meaning liable *to surrender for limitation* and not liable in a suit *in rem,* is apparent from his use of the term

"venture" and his citation of *The Columbia* case and the case of *Thompson Towing Co. v. M'Gregor,* in which the Circuit Court of Appeals for the Sixth Circuit cites the former with approval.

In the latter case there was a boiler explosion on the Stewart, a lighter accompanying a tug, which was the sole cause of the injuries to the claimants. The court found:

> "The absence of the safety valve might well be presumed the cause of the explosion and, for the purposes of this case, I think that fact should be considered as established."
>
> *Thompson Towing & Wrecking Assn. v. M'Gregor,* 207 Fed. 209 at 211.

The tug, the Merrick, occupied no place whatsoever in the causal chain leading to the injury, but because she was engaged in a common venture with the lighter, it was held that her value must be included in the fund for limitation of liability. The Merritt was not, as the Hercules in the case at bar, even lashed to the other lighter at the time the injury occurred on her, but was on the other side of the grounded steamer they were both serving. At the moment of the disaster the barge was doing nothing and the Merritt alone was occupied in towing. While this occupation contributed *to the venture* in which the lighter, just as the Hercules, was a component unit, her towing had nothing to do with the injury to those on the lighter, just as it is claimed (sic) that the power of the Hercules had nothing to do with the loosening of the towline it was pulling on through the Dauntless. Whatever

reasoning called for the inclusion of the Merritt in the fund calls *a fortiori* for that of the Hercules.

The rule is laid down at page 214 as follows:

> "They point out the necessity of studying the facts not only of the case in hand but also of the cases cited and relied on as precedents, for the purpose of identifying in each instance the offending thing, whether that be a *single or a composite instrumentality.* The particular feature, then, constantly to be borne in mind here is the mutual dependence of the Merrick and the Stewart in the work of releasing the Elwood; as Judge Addison Brown said in The Bordentown, 40 Fed. 687, when speaking of the Bordentown and the Winnie, although engaged in towing, they *'were in effect one vessel'.* Attention to a fact like this cannot be effectively diverted by allusion to the terms of employment of the Merrick and Stewart, because their *unitary characteristics existed at the crucial moment of the explosion.* We think this fact alone brings this case within the principles of the decisions relied on in the opinion below and distinguishes it from the cases claimed to be opposed to it. The existence of a similar fact in the Bordentown case was regarded as a distinguishing feature even in the Mason case, 142 Fed. 916, 74 C. C. A. 83 (C. C . A. 2d Cir.), upon which so much reliance is placed by the appellants."
>
> *Thompson Towing & Wrecking Assn. v. M'Gregor,* 207 Fed. 209 at 214.

Certainly for sole purposes of the venture, namely, furnishing power to tow the log raft on a single tow line and leading her over a certain course, no clearer example could be chosen of a "single instru-

mentality'' whose 'unitary characteristics existed at the moment of the loss of the raft'.

Counsel's attempt to claim that the basis of the decision as to the size of the fund in that case, is the separate liability of the Merrick for its fault, is answered by the fact that the Merrick would not be liable at all for the killing of workmen, as no right *in rem* exists for such tortious killing.

In relying on those two causes, it is thus clear that Judge Dooling must have referred to liability to surrender for limitation and not meant that liability *in rem* was the criterion for determining the elements of the venture to be appraised for the fund.

Counsel places great reliance on the decisions of the Second Circuit, the consolidated suits of the *W. G. Mason* and the *W. I. Babcock,* 142 Fed. 913, and the similar cases of the *Anthracite* and the *Wm. E. Cleary,* 162 Fed. 284, 168 Fed. 693, but fails to note that *these were suits in rem against each individual tug.* These were not cases of suing their owners *in personam* and their seeking to limit this personal liability by surrendering all their interests in this venture. They were cases where the only thing at issue was the participating of the individual units of the towing groups in acts occasioning the injury to other vessels. Unless the vessels were liable *in rem* the owners could not be liable at all. This is clear from the following paragraphs in *The Mason:*

> ''Does the fact that both vessels belonged to the same owner affect the question of *liability in rem?* If it does, it can only be because liability

> *in rem* is coextensive with the personal liability of the owner. This may be the law in England, but it is not the law in this country as declared by the highest courts. * * *
>
> "If, as these authorities assert, the personal liability of the owner is not an element in determining the *liability of a vessel in rem* for wrongs or torts, the decisions in The Bordentown and The Columbia, so far as they were based upon the contrary consideration, were erroneous."
>
> *The W. G. Mason,* 142 Fed. 913 at 917, 918.

It is true that there are dicta in these decisions contra to the rule laid down for this circuit in *The Columbia* and, in one at least, the court presupposes that it overrules *The Columbia,* but insofar as the decisions go off on the theory that the limit of the owner's liability is the liability of the tugs *in rem*, they are clearly distinguishable.

In the case of *The Sunbeam,* 195 Fed. 468, the Circuit Court of Appeals does apply *The Mason* decision to a loss of life claim, but does so without consideration of *The Columbia* or any of the argument made here or in that case. It cannot change the law in this circuit.

Judge Thomas' decision in *Van Eyck v. Erie Ry. Co.,* 117 Fed. 712, a District Court case also from New York, may be taken as an attempt to overrule *The Columbia.* Its reasoning was exactly that offered for the petitioner in *The Columbia* and there rejected and the present rule established for this circuit.

Neither of the District Court cases from this circuit in any way question the rule laid down in *The Columbia.* In *The Hercules,* 81 Fed. 218, Judge Morrow squarely held that the two tugs were not engaged in a common venture. The Sea Queen was sent out as the sole tug to tow the Packard. She became disabled and another tug, the Hercules, came out to act as her substitute. The court finds that the Sea Queen then lay alongside, simply awaiting repairs, while the Hercules towed in her place. *The Columbia* case is not even mentioned.

In *The Defender,* 208 Fed. 836, there were two tugs *owned by different parties.* A libel *in rem* was filed against each tug *in rem* and the suits consolidated. It was held that, as the Fearless was not negligent, she was not liable. *The Columbia* is not even cited, nor could it have been, as there was nothing in the case involving a single owner of two tugs who was seeking limitation of liability.

We therefore submit that, under *The Columbia* decision, it becomes a matter of indifference whether the locus of the negligence is on one or the other of these two tugs engaged in this single venture.

In our next section we will show that, from the very nature of the towage, the negligence claimed was necessarily bound up with a common use of the two tugs; and that, even under the rule of the Second District, both would be liable, if the Lumber Company can establish any liability at all.

III.

Even if the doctrine of proximate causation be applied in determining the vessels to be surrendered, the Tug Company, if liable at all for the particular negligence charged, is liable for that negligence in the united operation of both tugs. Res ipsa loquitur, not necessarily of the negligence, but of the joint participancy of the tugs, and hence the necessity for surrender of both to obtain a limitation of liability for the negligence charged. The mere denial of such joint negligence places its existence in issue, but does not change its joint character.

It is very important under this head to note the character of the Lumber Company's claim of negligence against which the Tug Company seeks limitation. The undisputed facts admitted in the petition are (1) that as the tugs were towing in tandem, the Hercules, the leading tug, must have chosen the route; and (2) that the power of the Hercules, at the very moment the tow line pulled off the drum of the towing machine on the Dauntless, was being exercised upon that machine to its utmost.

Petition, Apostles, page 10.

Now, the claim arising out of these facts, and against which limitation is sought, is that the combination was negligent in choosing the path it did over the Columbia River Bar, a negligence in which the Hercules necessarily participated, and that the negligent addition of the power of the Hercules to that of the Dauntless, was too much for the towing machine of the latter when it reached the rough water on the bar.

It is inconceivable to us how it can be asserted that, if claim of negligence can be established at all, it is not necessarily a negligence involving both tugs. Neither the petition nor the answer to the claim alleges that there was any other negligence confined peculiarly to the Dauntless. On the contrary the Tug Company's answer asserts that the raft became lost for "reasons unknown to petitioner" (Apostles, page 96). Nor could it have made such an allegation, for *any* neglect of the towing machine by *any one* on the Dauntless was necessarily the neglect of a person having in charge the control of the combined power of both tugs.

Res ipsa loquitur.

Of course, if there were no negligence at all, then there is no liability and no occasion for a limitation of liability. But a mere denial of negligence and liability is, as we have shown, not a ground for compelling a claimant to come into admiralty and abandon his State suit already at issue and depriving him of his jury. Where, as here, it appears on the admitted facts that the petitioner, if it is liable at all, is liable for a fund larger than the amount of the single claim, no reason exists for the limitation proceeding.

The acts of the two tugs in this case bring them well within the rule of the Second Circuit as laid down in *The Anthracite,* 168 Fed. 693. There, they were lashed together, furnishing a combined power and the negligence consisted in the dominant tug choosing a wrong course.

So likewise it is squarely within counsel's interpretation of the ruling in the *Thompson Towing & Wreck-*

ing Association v. M'Gregor, 207 Fed. 214, where the court said:

> "The particular feature, then, constantly to be borne in mind here is the *mutual dependence* of the Merrick and the Stewart in *the work of releasing the Elwood;* as Judge Addison Brown said in The Bordentown, 40 Fed. 687, when speaking of the Bordentown and the Winnie, although engaged in towing, they *'were in effect one vessel'*. Attention to a fact like this cannot be effectively diverted by allusion to the terms of employment of the Merrick and Stewart, because *their unitary characteristics* existed at the crucial moment of the explosion. We think this fact alone brings this case within the principles of the decisions relied on in the opinion below and distinguishes it from the cases claimed to be opposed to it. The existence of a similar fact in the Bordentown Case was regarded as a distinguishing feature even in the Mason Case, 142 Fed. 916, 74 C. C. A. 83 (C. C. A. 2d. Cir.), upon which so much reliance is placed by appellants. Again, we think it is fairly to be inferred from the opinion in the Mason Case that, while the steam tugs, the Mason and the Babcock, were engaged in towing the steamship 'Gratwick', they were acting in independent capacities and so did not present the fact which is controlling here."

So far as applying power through the towing machine of the Dauntless is concerned, there was 'mutual dependence of the Hercules and Dauntless in the work of towing the raft'. For the purpose of applying this power (always through this after towing machine) they "were in effect one vessel". These 'unitary characteristics continued at the crucial moment of crossing the bar at the wrong place'.

It is therefore submitted:

1. That the value of the Hercules must be included in the fund for limitation under the rule in *The Columbia* case, whether or not she participated in the negligence causing the loss.

2. That even if the rule of the Second Circuit is deemed to overrule that of the Ninth, the Hercules under the rule of the former jurisdiction *must* have participated in the negligent acts charged, and hence must be surrendered to secure a limitation of the liability flowing from these acts.

3. That where it appears that the fund must exceed the single claim, if there is any liability, and hence that there cannot in any event be a *limitation,* the injured party will be permitted to return to his pending suit in the State court and allowed the benefit of his jury in determining whether that liability exists.

Respectfully submitted,

WILLIAM DENMAN,
DENMAN AND ARNOLD,
Proctors for Appellee.

W. S. BURNETT,
Advocate.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

In the Matter of the Petition of the Shipowners and Merchants' Tugboat Company (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules", for limitation of liability.

APPELLANT'S REPLY BRIEF.

The decision of the United States Supreme Court in the case of

Laura G. White v. Island Transportation Company, 12 U. S. Advance Opinions, p. 589,

which came to hand after the preparation of appellant's opening brief, has definitely affirmed the right of a shipowner to invoke, where there is but one claim, the

special proceeding for limitation of liability, as accorded by the Federal Statutes and the Rules of the Supreme Court. This finally disposes, in appellant's favor, of one of the controverted questions in the court below.

We are frank to admit that the jurisdiction of a district court to entertain the statutory proceeding for limitation of liability may be seriously doubted where there is, and can be, but one claim of less amount than the value of the interest of a petitioner in the vessel, and her freight pending, required to be surrendered. In such a case, it would reasonably appear that there was nothing to limit, and, therefore, no occasion for the special proceeding and the enjoining of a previously instituted action in a state court upon the claim. Yet, no court, so far as we are aware, has directly adjudicated the question.

That, however, is not the case before this court, for, aside from the ultimate question of liability for the loss, there is in direct issue here two factors, the want of which constitutes the very condition upon which is founded the denial of the right to invoke the special proceeding in the assumed case. That is to say, if the special proceeding cannot be had in a case where there is but one claim of less amount than the value of the property to be surrendered, it is because there is nothing to limit, and, therefore, no right of limitation. On the other hand, in the cause now before this court, there is in positive controversy under the petition and

answer, the question of the identity of the vessels required to be surrendered, and of the right of limitation of liability at all. The fact, then, that the right to invoke the special proceeding in the assumed case might not lie, is not determinative of a like conclusion in the instant case.

THE TEST OF SURRENDER IS FAULT, WHICH CAN ONLY BE DETERMINED BY A TRIAL.

It is the contention of appellant that the question as to whether its interest in both the tugs "Dauntless" and "Hercules", or in the "Dauntless" alone, is required to be surrendered, if there be liability for the loss of the raft, can only be settled by a trial in which shall be determined the question as to whether there was fault attributable to both, or only one, of the tugs. On the other hand, it is asserted by appellee that there can be no question of what is required to be surrendered, but that the fact of both tugs being of common ownership and engaged in the same venture predetermines that appellant must respond for the full value of the raft, if there be liability for its loss, as the combined values of the tugs exceed the value of the raft.

The determinative fact of surrender, on appellee's theory, is that of both tugs being engaged in the same venture, irrespective of whether one alone was in actual fault.

Manifestly, if appellant is called upon at all to respond in damages for the loss of the raft, it will only be required to do so if there was actionable fault on

the part of one or both of the tugs, arising in the towage service. It is its liability, as the owner of the tugs, for such fault, against which, if at all, it is entitled to a limitation. There is, then, essentially involved the question of fault on the part of one or both of the tugs, and in determining that liability is to be limited to the value of one, or to be extended to that of both, the court must find an existing fault. If that fault is common to both, appellant must respond for their combined values; if but one was in fault, it alone must be surrendered. *The question as to whether both, or only one, of the tugs were in fault is, of necessity, however, one that can only be determined after a trial.*

It is strenuously contended by appellee that the cases of

The Bordentown, 40 Fed. 682;
Short v. The Columbia, 73 Fed. 226; and
Thompson Towing & Wrecking Co. v. McGregor, 207 Fed. 212,

sustain the proposition that the fact of the tugs being engaged in the venture, irrespective of whether fault is actually attributable to both, determines the necessity of surrendering both tugs. We confess our inability to so read the decisions, but, on the contrary, construe them to hold that because fault was attributable to both vessels, in the respective cases, the surrender of both was, in each instance, required.

In

The Columbia, supra,

the tug and barge, engaged upon a contract of carriage, were held to be one vessel, and, as one vessel, the

fault was regarded as that of the unit. Why were they held to be one vessel? Certainly not because they were attached to each other when the loss occurred, for they were then detached. Nor simply because they were engaged in the same venture. But, as the court carefully pointed out, by full explanation of the character of the service in which they were employed, they became, when the tug made fast and took the barge in tow, one vessel for the purpose of that voyage, *to perform the contract of carriage,* as much so as if the barge had been taken bodily aboard the tug.

That the contract of carriage was an essential element in determining the unitary character of the vessels, is concluded by the court's reference, by way of authority, to two decisions of the Supreme Court which so lay down the law.

The Northern Belle, 9 Wall. 526, 529;
The Keokuk, 9 Wall. 519.

The tug and barge were not held to be as one vessel simply because they were tug and tow, but because each was dependent upon the other, the barge furnishing the carrying capacity and the tug the motive power, in the performance of the contract of carriage. The merging of their separate characters into one, for the purpose of the voyage in performing the contract of carriage, of which one was as essential a part as the other, cannot, however, be made to support the broad proposition that two tugs, engaged upon a single towage, become one vessel simply because employed in the same venture.

In

The Bordentown, supra,

the two tugs were required to be surrendered because the act of the master of the "Bordentown", in negligently proceeding on his voyage, under unpropitious conditions, was held to be the fault of both vessels *by reason of the master's common command over them.* Both were not required to be surrendered simply because commonly owned, or attached together in the same service, *but because of a fault common to both while so operated together.* That the element of fault, common to both vessels through the common master, was the criterion by which surrender was determined, is emphasized by the care with which Judge Brown pointed out that the third tug "Willie" was not so chargeable. She was not excused alone because unattached to the tow, for if that were the measure of liability to surrender, the "Ocklahama" in *The Columbia* would not have been held. Rather, it was the question of fault, and as the negligence of the master of the "Bordentown" could not be attributed to her, her surrender was not required.

So, in

Thompson Towing & Wrecking Co. v. McGregor, supra,

the "Merrick" and the "Stewart" were required to be surrendered because the "Stewart" was interdependent upon the "Merrick", as both were engaged in the same service, attached to each other through the "Elwood", and *because the negligence, which caused the loss, was that of the local manager having supervision of both*

vessels. The surrender of the "Merrick" and "Stewart" was not required simply because they were engaged in the same venture, or because attached to each other. Further merging of identity so as to bring home to both, the fault which caused the loss, was held essential. This could not be more clearly pointed out than by the fact that though other vessels of the same owner were engaged in the same venture, their surrender was not required. The fact that they may, perhaps, not have been attached to the "Stewart" at the time of the accident is not decisive, as demonstrated by *The Columbia.*

The Circuit Court of Appeals referred to this exemption of surrender as a complete answer to the contention made by counsel that the doctrine of the district court's decision would involve a common liability for steamer and barges in a tow, regardless of the question of the fault of the respective vessels; that, in relation to the wrecking business, it would involve all tugs, pumps, lighters, etc., merely because they happened at some time to have been engaged upon the release of the same vessel and irrespective not only of their fault but of the extent or character of the service is which they were engaged, or even the terms of their employment; and in general that it would practically nullify the right of the owner to limit his liability to the value of the vessel or vessels *actually responsible for an injury,* and extend that liability to all other vessels and property which such owner happened to have, and which chanced to be directly or indirectly connected with the expedition upon which the accident occurred.

The very fact that the Circuit Court of Appeals took occasion to expressly disaffirm that the district court's decision would have the effect inferred, is the strongest dissent that can be made to the assertion that the case upholds a rule which would require the surrender of two tugs simply because they were engaged in the same towage venture.

The determination of the fault, and the identification of the vessel committing the fault, is the test of surrender. The necessity of this conclusion is made obvious by the following statement:

> "It is strenuously argued by counsel that to hold the 'Merrick' would be to establish a rule that would be most injurious to the shipping interests of the Great Lakes. The reason assigned is stated in the margin. The most obvious answer to this complaint is that although the appellants furnished at least four vessels to release the 'Elwood', the effort made in the court below, as we have already said, to hold any of them except the 'Merrick' and 'Stewart' failed. We should add that the appellees sought also to have the 'Elwood' and her cargo, held, but the application was denied. These eliminating processes of the trial court do more than to illustrate the error of the criticism made of the decision. *They point out the necessity of studying the facts, not only of the case in hand, but also of the cases cited and relied on as precedents, for the purpose of identifying, in each instance, the offending thing,* whether that be a single or a composite instrumentality." (Italics ours.)

That district Judge Dennison likewise considered that surrender must be conditioned upon actual fault being attributable to the vessel, or vessels, required to be

surrendered, is patent from the following excerpt from his opinion:

> *"The situation would be different if the negligent act which is to condemn the particular guilty rem, had been the independent act of an agent who had to do with the 'Stewart' only* (as in the Mason and similar cases). Here, however, the damage (d) claimant (s) count upon the negligence of the agent, in charge of both boats, who equipped and sent out the defective boiler, as part of a working unit, and the damage happened at a moment when these possibly separable parts were, in fact, united." (207 Fed., at p. 213.) (*Italics ours.*)

The controlling element, therefore, by which all of the vessels in the foregoing cases were required to be surrendered, was that of fault attributable to each of the vessels, and not simply that they were engaged in the same venture. The cases are thus not out of accord with the decisions in

Van Eyken v. Erie R. Co., 117 Fed. 712;
The Anthracite, 162 Fed. 384;
The W. G. Mason, 142 Fed. 913; and
The Sunbeam, 195 Fed. 468.

For, in all of these cases, the vessels required to be surrendered were each found to be in fault, the specific act of fault being pointed out by the court. In the *Van Eyken* case, surrender of the barge was not required, because "it was not part of the wrongful act", the fault being that of the tug alone. In *The Anthracite,* both tugs were in fault for the negligence of the master of the "Anthracite", who controlled their navigation. They were held to come within the rule in *The Arturo,* 6 Fed. 308, and yet, in that case, Circuit Judge Lowell

expressly said, in holding both tugs liable for joint negligence:

> "If, therefore, one tug was wholly in fault, as by a defect in her machinery or the like, she alone would be responsible."

In *The Mason*, the tug "Babcock" was not required to be surrendered because not in fault, although she was equally engaged with the tug "Mason" in the same venture, and as much attached to the "Mason", through the steamer in tow, as was the "Stewart" to the "Merrick", through the "Elwood".

It is impossible, therefore, to avoid the conclusion that *the test of the requirement of surrender is that of fault on the part of the vessel,* through the conduct of master and crew. The purpose of the Act is to limit the liability of the shipowner in respect of claims arising out of the conduct of the master and crew, whether the liability therefor be non-maritime or maritime, or whether the remedy be *in rem* or *in personam.*

Butler v. Boston & Sav. S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Richardson v. Harmon, 222 U. S. 96; 56 L. Ed. 110.

The liability against which the Act grants at least partial immunity, is one arising out of ownership in a vessel, and liability as owner can not arise unless there be fault on the part of the vessel, her officers or crew. It necessarily follows, therefore, that a vessel, or her master or crew, must be found in fault, as the condition precedent to requiring an owner to respond to the value of his interest in the vessel.

The question is thus presented: how is such fault to be determined? Certainly in but one way,—by a trial upon the merits, just as the Supreme Court pointed out in the case of *Laura G. White v. Island Transportation Company,* supra, that the question as to whether the petitioner was entitled to the benefit of the limited liability act, in issue under the pleadings, was to be settled by a trial.

So it is in this case. The question as to whether appellant, if liable for the loss of the raft, shall be required to surrender both the "Hercules" and the "Dauntless", or only the vessel in fault, can only be settled by a trial upon the merits, in which shall be ascertained and determined the fault, if any, and the identity of the tug causing the loss.

It is incorrect for appellee to say that it is appellant's contention that the ultimate factor in determining whether the value of a vessel should be included in the fund is whether it is itself liable *in rem* for the injury done. We are not unaware that actions *in rem* cannot be maintained for many injuries for which limitation of liability is granted by the statute, and that the form of action by which indemnity for a wrong may be secured has nothing to do with the shipowner's right of limitation of liability. But we do say that the ultimate factor is whether or not the vessel or vessels, her officers or crew, are in fault, whether the tort be maritime or non-maritime, or whether there be a right of action *in rem* or only *in personam.* It is the liability of the shipowner, as owner of the vessel, which is limited against a liability for tort committed

by a vessel or vessels, her officers or crew. But the criterion for determining the size of the fund is not as appellee asserts, the owner's whole interest in the voyage and venture, but is the shipowner's interest in the vessel and her freight pending. If the owner have a claim over against another vessel or owner, for damages to his vessel occurring on the voyage, on which limitation is sought, such claim must be surrendered on the authority of

O'Brien v. Miller, 168 U. S. 306,

because such claim or right of action is to be considered as a substitute for the ship itself, as representative of the ship and freight. While, however, such criterion is a factor in determining the size of the fund, if a fund is required to be distributed, it does not determine whether the owner must respond for the value of the vessel and her freight pending. That is dependent upon the question as to whether there was fault on the part of the vessel, her officers or crew.

There is put in issue by the petition and answer the question as to whether the loss of said raft, and all other damages and injuries, whether of persons or of property, done, occasioned, and incurred upon said voyages of said tugs, was done, occasioned or incurred by the neglect of said tugs or the officers or servants of appellant. It is true that the answer of appellee to the petition alleges a joint negligence on the part of both tugs in proceeding through the wrong channel, and in that the towing machine of the "Dauntless" was not strong enough to withstand the combined strain of the pulling power of both tugs. Inasmuch as affirma-

tive allegations of an answer are deemed denied under admiralty practice, the status of the pleading but demonstrates that the question of fault can only be determined by a trial upon the merits. With such a controversy framed by the pleadings, is appellant to be foreclosed from adducing proof to establish its implied denial of joint negligence on the part of both tugs, and in support of its averment of entire want of negligence on the part of either? Assuming the proposition to be sound, that the court is without jurisdiction if there be but one claim in excess of the value of the vessel required to be surrendered, the pleadings effectively put in issue the question of jurisdiction, and yet where that was done in the case of *Laura G. White v. Island Transportation Company,* supra, the Supreme Court said:

> "The questions of fact so presented were to be settled by a trial, and this was so whether the facts were jurisdictional or otherwise."

It is no answer to say that the allegations of appellee's answer to the petition, and its complaint in the state court, only charges a joint negligence, for that fact would not foreclose appellee from taking advantage of any separable negligence that might be established on the part of either tug. It is true that negligence on the part of either tug is not admitted by appellant, for it denies any negligence, but that fact will not prevent a full hearing upon the merits, and if upon the trial separable negligence were shown, appellee would rightfully claim its right of recovery therefor.

It follows that the district court erred when it held that both tugs were liable simply because engaged in the same venture at the time of the disaster. Nor can it be said, as counsel would construe the decision, that the court only meant liable to surrender, for the words of the court are free from ambiguity in that regard. The error of the court was in denying appellant the right to meet, on a trial, the issue as to whether neither, or one, or both tugs were in fault for the loss of the raft. The fact that the towing power of both tugs was applied to the hawser from the "Dauntless" to the raft is not, of itself, decisive of the fault of either, or both of the tugs, for the cause of the loss of the raft may have been entirely independent of any negligent application of the power of the tugs. What the cause was would be disclosed on a trial, and then the question of the identity of the vessel, for the value of which appellant must respond, if there be fault, could be properly determined. But without a trial upon the merits, in which shall be settled the question of fault, appellant will certainly be denied the right granted it by the statute.

Furthermore, the pleadings put in issue the question as to whether appellant is entitled to a limitation of liability at all, by reason of priority in, or knowledge of, the cause of the loss. That it is deemed essential to the determination of the rights of the parties is evidenced by the fact that it is appellee's denial, which puts it in issue. If it should be held that appellant is not entitled to the benefit of the Act, then the ruling of this court in

Weisshaar v. Kimball S. S. Co., 128 Fed. 397, would become applicable, but on no other ground. The question of the right of limitation under the Act has been held to be one of admiralty cognizance.

The Lotta, 150 Fed. 219.

It can only be determined, however, by a trial which shall disclose a negligent cause of the loss, within the privity or knowledge of appellant.

We, therefore, respectfully submit that the decision of the lower court should be reversed, with instructions to proceed to a trial upon the issues made by the pleadings, in accordance with the rules and practice in limitation of liability proceedings provided.

Dated, San Francisco, California,
July 18th, 1914.

EDWARD J. MCCUTCHEN,
IRA A. CAMPBELL,
MCCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

REPLY BRIEF OF HAMMOND LUMBER COMPANY, APPELLEE.

Appellant takes two positions with regard to the right of the District Court to deprive us of our jury trial and state tribunal in the case now at issue in Oregon, both of which we deem patently fallacious.

These are that:

1. The fault of the individual vessel determines the necessity for its surrender, thus denying the plain holding by this court in the "Columbia" case that an instrumentality which was immediately engaged in the ven-

ture, as a tug furnishing its motive power at the time of the alleged negligence, must be surrendered regardless of its causal relationship to the loss;

2. Although the single claim must exceed the fund to confer jurisdiction for limitation, this jurisdictional fact need not be alleged and the court must hear the cause though no jurisdiction is pleaded, because it *may* be shown at the trial that the claim exceeds the fund and the pleadings *then* amended to set it forth.

The latter claim is novel to our experience and we are filing this short reply to meet it, incidentally touching on the first point.

I.

The surrender of the tug does not depend on its individual fault, but on its "unitary identification" with the other vessel for the purpose of the voyage.

Under the heading "The Test of Surrender is Fault", counsel asserts that unless the "Hercules" and "Dauntless" each participated in the fault, both need not be surrendered, and claims that *The Columbia* does not oppose this doctrine.

The simplest method of answering counsel's contention is to place his words and the court's in parallel columns.

Counsel's Statement.	The Court in the Columbia. 73 Fed. 223 at 238.
	"The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. *But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel,* for the purpose of the voyage in question, and, whether the accident giving rise to the loss and
"We confess our inability to so read the decisions, but on the contrary, construe them to hold that because *fault was attributable to both vessels,* in the respective cases, the surrender of both was, in each instance required."	

> damage be *directly attributable to the acts* of the master of the barge, or to *those of the master of the tug,* it is equally the negligence of the carrier, for which it contracted to be liable.

Nothing could be clearer than that the court did not make the Ocklahoma's "fault the test of her surrender". On the contrary, it held squarely that the Ocklahoma, with no physical causal connection with the death of the men at all, must be surrendered because for the "*purpose*" of the voyage, she is to be considered as one vessel with the barge, being one of the two conjoint instrumentalities with which the carrier was carrying out its contract of transportation. It is participancy in the venture, i. e., the contract of transportation, and not participancy in the fault, which determined whether the tug Ocklahoma should be surrendered.*

Applying this test, can there be any question that the Hercules, which was a unit with the Dauntless in furnishing the towing power called for by the agreement for towage, participated in the contract for transportation in the same way that the Ocklahoma did in the Columbia case? We submit that every reason for

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* Counsel has evidently abandoned the contention advanced by him at the argument, that the owner, in the Columbia case, was towing the barge and wheat as a common carrier, and hence that a higher obligation was placed on him there, than in towing the log raft. The record fails to state any facts showing that the Columbia was acting as a common carrier. On the contrary it is apparent that there was but a single consignment of wheat constituting the entire cargo. (The Fri, 154 Fed. 333.)

surrendering the tug Ocklahoma to pay the claims for the men killed on the Columbia, to which the tug was not even attached, applies *a fortiori* to the Hercules, which was attached to the raft and exercising her full power at the moment of the negligence charged.

From one point of view this question is more or less academic, for as the claim in this case is pleaded, it states a tort necessarily involving the joint control of both vessels and makes our recovery necessarily require a surrender of both, even on the theory of the most extreme of our opponent's cases. In our next section we show that with this identification of the two tugs appearing in the pleadings, the jurisdiction for a limitation of liability necessarily fails.

II.

The single claim must exceed the fund to confer jurisdiction for limitation of liability. This jurisdictional fact must affirmatively appear, and the court cannot hear the cause when such jurisdiction is not pleaded, merely because some other tort not pleaded may be shown at the trial and the pleadings then amended to allege the jurisdictional facts.

In our opening brief we have shown that we could recover on our claim solely if we showed that there was a negligence in the joint control of the two tugs. That is to say, there will be no liability at all to limit unless we establish either that there was negligence on the part of the person in charge of the power of *both* tugs or negligence on the part of the navigator who chose the course of *both*.

Counsel ignores this contention entirely and prefaces his brief with the bold assertion that "there is in positive controversy under the petition and answer the question of the identity of the vessels required to be surrendered". A careful examination of the actual controversy between the petitioner and the Lumber Company we feel will show this assertion entirely unwarranted.

The petition gives a full account of the method in which the two tugs were towing the raft at the time of the disaster. They were towing *in tandem.* All the power of the Hercules was exercised on the towing machine of the Dauntless, and hence *ex necessitate* any

negligence with the latter's towing machine, whether in its original power or its maintenance or manipulation, was a negligence in applying the power of the Hercules to the log raft.

Our contention is that this machine which thus transmitted and regulated the power of *both* tugs, was not strong enough to regulate and transmit this combined power; that the cable to the log raft, through which this joint power was applied, was improperly fastened to the towing machine; that the passage chosen for the course of these jointly operating vessels was improper, and its currents added a strain to their joint strain; that the lead tug had control of the following tug, and as it did not keep in line with it, pulled it to one side so that the line to the raft, by reason of this want of co-ordination of the two tugs, became alternately slackened and subject to strain, whereby control of the raft was lost; and that as a result of these, the line carrying the joint power of both tugs was pulled off from the drum of the Dauntless, the log raft lost the power of both tugs and was wrecked on the spit.

Every allegation in our claim was as to a negligence, either of the Dauntless in transmitting the power of the Hercules to the raft, or of the Hercules in improperly creating and applying power which she first must *put into* the Dauntless before it could reach the raft. There is not a single act alleged which is not based on what is called in the Second Circuit the "unitary characteristic" of the two tugs.

Thompson Towing Co. v. McGregor, 207 Fed. 209 at 211.

The answer to our claim does not attempt to set up a defense that the negligence, if any, was confined to but one tug. While admiralty allows such an alternative traverse, it *is apparent that, from the very nature of the combination of tugs, neither could do anything affecting the line to the log raft* without also involving the other's relation to the log raft. So far as they affected the raft, they were more interdependent than the Siamese twins. We therefore find the petitioner denying any negligence whatsoever.

In the case of *Thompson Towing Co. v. McGregor,* 207 Fed. 209, the District Judge points out that

> "The damage claimant COUNTS *upon the negligence of the agent in charge of both boats,* who equipped and sent out the defective boiler, as part of a working unit, and the damage happened at a moment when these possibly separate parts were, in fact, united."
>
> *Thompson Towing Co. v. McGregor,* 207 Fed. at 213.

It is what the claimant "counts upon" which determines the controversy and here, as in that case, the Lumber Company counts upon the negligence of the "agent in charge of both boats" who improperly combined their power and chose their course, and the negligence of those on each boat which could affect the raft only by affecting the other's relation to the raft.

Petitioner's general allegation that the Hercules did not participate in the acts causing the loss, yields to his specific allegation that it was exercising its power on the raft (10) through the Dauntless, at the moment the tow line transmitting the joint power was torn from

the combination. On petitioner's own statement of the case, we cannot recover on the tort alleged without involving the Hercules. Petitioner alleges that this loss of the joint power of the two tugs was without negligence, we assert that negligence caused it, but in either event what was lost was the *joint* power.

Counsel agrees, at page 2 of his reply, that the District Court has jurisdiction to limit liability only where the fund is less than the claims. It is elemental that in the Federal Court such jurisdictional facts must affirmatively appear. They cannot be supplied by inference from other allegations, or by the requests of the prayer.

> *Central Door Co. v. California-Atlantic SS. Co.,* 206 Fed. 10 and 11, and cases at page 9 of our opening brief.

The absence of any allegation of fact that there was *separate negligence of the tugs, or of any claim under which the Lumber Company could recover against petitioner on the theory of such separate negligence,* defeats the jurisdiction of the court.

Counsel suggests that although the negligence we rely on in our pleadings is exclusively joint in its nature, still the court has jurisdiction, because some other kind of negligence *may be* discovered at the trial which will be confined to but one tug, and hence satisfy the jurisdictional requirement that the fund shall be less than the claim.

That we are not doing an injustice to our able opponent in thus characterizing his contention, we quote his own statement:

> "It is no answer to say that the allegations of appellee's answer to the petition, and its complaint in the state court, only charges a joint negligence, for that fact would not foreclose appellee from taking advantage of any separable negligence that might be established on the part of either tug. It is true that negligence on the part of either tug is not admitted by appellant, for it denies any negligence, but that fact will not prevent a full hearing upon the merits, and if upon the trial separable negligence were shown, appellee would rightfully claim its right of recovery therefor."

In other words, on a general demurrer or plea to the jurisdiction, the petitioner may say, "true, jurisdiction does not appear, but, nevertheless, the court must try the case, because it may appear at the trial and the pleadings amended so as to then show jurisdiction".

It is possible that if, at the trial, there were shown an entirely different cause of action, consisting of a tort which was confined to one tug, the liberality of admiralty pleadings would permit an amendment to conform to the facts and jurisdiction might *then* be shown. This, of course, cannot be shown, because if petitioner be liable at all, it would be for the negligence of some employee, who thus caused the severance of the power of *both* tugs from the raft. But, even if such severable negligence were a possibility, petitioner's faith in the proof of something which he denies and which his opponent does not allege, and in the liberality of the court in amendment, does not seem a satisfactory substitute for jurisdictional averments.

It is therefore submitted that, even if the test of surrender of both tugs is their joint fault, there is no

jurisdiction shown for a limitation proceeding, because there can be a recovery under the pleadings only if there is joint fault, and if there is joint fault the fund must exceed the claim. The judgment of the court must be either no liability, or no limitation of liability, a controversy in which the state court alone is concerned. We therefore should be permitted to go on with the trial of our case now at issue in Clatsop County, Oregon.

WILLIAM DENMAN,
DENMAN AND ARNOLD,
Proctors for Appellee.

W. S. BURNETT,
Advocate.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

In the Matter of the Petition of the Shipowners and Merchants' Tugboat Company (a corporation), owner of the Steam Tugs "Dauntless" and "Hercules", for limitation of liability.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Shipowners and Merchants' Tugboat Company, appellant and petitioner herein, respectfully requests a rehearing in this cause.

The court states in its decision that it thinks that enough is alleged in the appellant's petition to show that if either tug was liable to surrender both were. The court apparently assigns three reasons for this opinion, for it immediately states:

> (1) "It appears therefrom that both tugs were engaged in a common venture,"
> (2) "that both were exerting a strain upon the hawser when it parted,"
> (3) "and that the 'Hercules' as the leader of the tandem of tugs must necessarily have participated in the selection of the route and the direction of the movement of the tugs and tow."

We respectfully submit that the decision errs:

First, in that it cannot be supported upon the first ground, that of the tugs engaging in a common venture, as alone sufficient, but that actionable fault must be attributed to both tugs;

Second, in that the court is mistaken when it states that the hawser parted; and

Third, in that there is no allegation of the petition showing that the selection of the route or the direction of any movements common to both tugs and tow contributed as a fault to the loss of the raft.

I.

It is not our intention to extensively review the cases already cited to the court on the hearing, but we ask the sufferance of the court to point out that in none of them has the fact that two vessels were engaged in the same

venture been held alone sufficient to require the surrender of both vessels in limitation proceedings. In every instance of which we are aware, where surrender of both vessels was required, *it was because of fault attributable to both.* Certainly this was true of the decision in

> *Thompson Towing & Wrecking Ass'n v. McGregor,* 207 Fed. 209,

cited with approval by this court, for how could it be more clearly pointed out than in the following excerpt from the opinion of the Circuit Court of Appeals?

> "It is strenuously argued by counsel that to hold the 'Merrick' would be to establish a rule that would be most injurious to the shipping interests of the Great Lakes. The reason assigned is stated in the margin. The most obvious answer to this complaint is that although the appellants furnished at least four vessels to release the 'Elwood', the effort made in the court below, as we have already said, to hold any of them except the 'Merrick' and 'Stewart' failed. We should add that the appellees sought also to have the 'Elwood' and her cargo, held, but the application was denied. These eliminating processes of the trial court do more than to illustrate the error of the criticism made of the decision. *They point out the necessity of studying the facts, not only of the case in hand, but also of the cases cited and relied on as precedents, for the purpose of identifying, in each instance, the offending thing,* whether that be a single or a composite instrumentality." (Italics ours.)

The District Court had already proceeded upon the same theory, as so unmistakably appears from the following statement of Judge Dennison:

> *"The situation would be different if the negligent act which is to condemn the particular guilty rem, had been the independent act of an agent who had to do with the 'Stewart' only* (as in the Mason and similar cases.) Here, however, the damage (d) claimant (s) count upon the negligence of the agent, in charge of both boats, who equipped and sent out the defective boiler, as part of a working unit, and the damage happened at a moment when these possibly separable parts were, in fact, united." (p. 13.) (Italics ours.)

This necessity of identifying the "offending thing" is further emphasized by the fact that the court required the surrender of the "Stewart" and the "Merrick" alone, although at least four vessels were engaged in the same venture of releasing the "Elwood". It was not, however, the fact of "common venture" which caused the surrender of the "Stewart" and the "Merrick", but that of fault attributable to them, and not the fact of both tugs engaging in the same venture.

The same principle forms the basis of the decision in

The Bordentown, 40 Fed. 682,

for Judge Brown was careful to state in the very excerpt which this court quotes in its opinion that the negligence for which the tugs were responsible *was that of the common head,* the master who controlled the navigation of the tow. Of what concern was it that both boats were in control of the same master who committed the fault, if it was not that this fault was attributable to both? Even without this common negligence, they were engaged in the same venture. The very fact, then, that Judge Brown took occasion to

bring out so plainly the common fault demonstrates that attributable fault was the test he was applying.

Similarly in

The Sunbeam, 195 Fed. 468.

This court pointed out this distinction in its interpretation of the decision in

The W. G. Mason, 142 Fed. 913,

when it said:

> *"The 'Mason' was exonerated for the reason that she had nothing whatever to do with the signalling of the tow."*

Both the "Mason" and the "Babcock" were engaged in the same venture, "joint undertaking" as this court characterizes it, of towing the steamship "Gratwick", but each was acting independently of the other in doing a distinct part of the work. If, therefore, the fact of the two tugs being engaged in the same venture was the test, why should not this court disapprove of *The Mason* decision? But it does not, simply because something more than a "joint undertaking", "common venture", is necessary to surrender, to wit, fault attributable to the vessels engaged. The "Babcock" was not shown to have been in fault; hence her surrender in limitation was not required, notwithstanding her participation in the joint undertaking.

To the same effect is

The Anthracite, 168 Fed. 693,

where the Circuit Court of Appeals for the Second Circuit succinctly pointed out in the following language,

the same distinction as made by this court, in citing the case with approval:

> *"The Mason was held because,* in doing her part of the work, *she committed fault. The Babcock was exonerated, because she had nothing at all to do with that part of the work* (the signalling of the tow) *in which the fault was committed."*
>
> "Here the facts are different. The fault was in steering, rounding to so carelessly as to bring the tow against the rock. The master of the 'Anthracite' directed the steering, and the master of the 'Cleary' submitted herself entirely to her commands. There was no independent action. In the steering both participated. * * * Practically for the time being, the master of the 'Anthracite' was the master of the 'Cleary', and the latter participated in the act—improper steering—which caused the catastrophe."

The same rule was applied in

Van Eyken v. Erie R. Co., 117 Fed. 712.

Surrender of the tug was required because in fault for the collision; *surrender of the barge was not required because no fault was attributable to her as a primary agent,* yet both tug and tow were of a common instrumentality and engaged in the same venture.

It is to us unanswerable and we frankly believe this court to be of the same opinion, that the test of surrender is not alone the fact that two vessels may be engaged in the same venture, but that fault attributable to both, is the essential criterion. How otherwise can the decision of the Circuit Court of Appeals for the Second Circuit in *The W. G. Mason,* and *The Anthracite* be reconciled with each other or that in *The Mason* with the ruling of the Circuit Court of Appeals for the

Sixth Circuit in *Thompson Towing & Wrecking Ass'n v. McGregor?* If "common venture" were the test, then surrender of the four vessels engaged in the releasing of the "Elwood" would have been required in *The Thompson* case, for they were as much a part of the "same venture" as the "Ocklahama" and the barge in the case of *The Columbia.* Similarly, the tugs "Mason" and "Babcock" were as much a single instrumentality and engaged in common venture as the "Stewart" and the "Merrick" in *The Thompson* case, for in both instances the two vessels were not made fast to each other but to an intervening vessel. Common venture would have thus necessitated the surrender of the "Babcock" as well as the "Mason", or the cases are not in accord. So with *The Bordentown* and the *Van Eyken* case. The "Winnie" and the "Bordentown" were no more a single instrumentality or part of a common venture than were tug and barge in the *Van Eyken* case, and the latter were certainly more so than the "Ocklahama" and the barge in *The Columbia.*

These various decisions cannot be reconciled with each other upon any other theory than that in each the court applied the test of attributable fault in determining whether the surrender of any given vessel was required. Adjudged then by that principle, however, and every case is consistent with the others. It is the basis of each decision, otherwise the various courts would not have been so careful in each instance to identify the offending thing.

Inasmuch as this court was impelled to say that the decisions in *The Anthracite* and *Thompson Towing and Wrecking Ass'n v. McGregor* are in point with the case at bar, it must have intended to hold that "attributable fault" is the test of surrender and not the fact alone of engaging in the same venture. Only upon this theory can this court's decision in *The Columbia* be reconciled with the decision of the other courts. That such was the test which this court understood it was applying in *The Columbia* is evidenced by its later decision in

The San Rafael, 141 Fed. 270.

Although the "San Rafael" and the "Sausalito" were not a single instrumentality, or engaged in the same venture, the court held that both vessels had to be surrendered as a condition to the right of the owner to invoke the statutory right of limitation of its liability. Fault attributable to both the "San Rafael" and the "Sausalito" was the reason of the rule requiring the surrender of petitioner's interest in both vessels, and this rule must have then been this court's interpretation of the decision in *The Columbia,* for that case is there cited as the supporting decision, and it still remains the rule by the unanimous decision of all the courts.

We, respectfully submit, therefore, that the decision of the District Court cannot be sustained alone upon the ground that, on the occasion of the loss of the raft, both tugs were engaged in the same venture. If such, perchance, was the intended ruling of this court, we submit that it was erroneous and not in accord with the settled principles established in other cases.

II.

If we are right in our statement of the rule that there must be fault attributable to both vessels to require their surrender as a condition to the owner's right of limitation of liability, the inquiry is pertinent as to whether the petition herein shows such common fault, if there be fault at all.

We read the court's opinion as, in effect, holding that, if either tug was liable to surrender, both were, because it appears from the petition that both were exerting a strain upon the hawser when it parted. The fact of their engaging in common venture is not alone sufficient to require their surrender; there must have been mutual fault. The fault, if any, therefore, which the court on its interpretation of the petition, would attribute to both vessels must have been the exerting of a strain by both tugs upon the hawser when it parted. If it were the fact that the loss resulted from the hawser parting, and the latter was caused by the negligent straining of both tugs, then undoubtedly the surrender of both would be required as fault would be attributable to both. *But the petition does not show that the hawser parted; in this the court is in error.*

The petition distinctly states:

> "That said tugs continued pulling upon said raft until after it passed the black buoy off Peacock Spit, *when suddenly and without warning said raft pulled the towing hawser off the towing machine on the tug 'Dauntless',* and upon so being freed, drifted into the breakers on Peacock Spit, and became a total loss."

It nowhere appears that the loss of the raft, even if brought about by a cause for which petitioner would be liable, was caused by a strain exerted by both tugs parting the hawser. The petition does not aver a strain by the tugs which caused the hawser to part, but alleges that suddenly and without warning *the raft pulled the towing hawser off the towing machine* on the tug "Dauntless".

We most respectfully represent, then, that the court was mistaken when it found that it appeared from the petition that both tugs were exerting a strain upon the hawser when it parted. If this was not the fact, how can it be said, then, that if either tug was liable to surrender, both were? Surrender can only be predicated upon fault. While such fault, if it had been that a strain effected by both tugs causing the hawser to part, might have required a surrender of both, still this court cannot say that such fault would equally exist on the part of both tugs if the raft was, perchance, lost through some negligence which might have caused the raft to pull the hawser off the towing machine. The distinction lies in this; that the court apparently assumes that if there was liability upon either tug, it was because of a strain applied by both tugs which caused the hawser to part; on the other hand, the petition avers that the raft pulled the hawser off the machine, and this, even if negligently brought about, may or may not have been caused by any negligence on the part of the "Hercules". If there had been negligence in the strain, then the court's assumption might not be open to question; but as the petition does not show

such common strain, and parting of hawser, it cannot be said that the loss of the raft, if caused by its pulling the hawser off the towing machine, was necessarily caused by joint negligence of both "Hercules" and "Dauntless". It might well be that the evidence would show the negligence, if any, to be alone attributable to the "Dauntless", for the towing by the "Hercules" would not necessarily have caused the raft to pull the hawser off the machine. If it were only so attributable, then, on the authority of all the cases the "Dauntless" alone would be required to be surrendered. This can only be established by a trial upon the merits.

We respectfully submit, therefore, that the conclusion by the court that if there was fault at all, it was attributable to both tugs, is based upon the mistaken premise as to the allegations of the petition. On the contrary, if every effect be given the averments, it cannot be found that fault, if chargeable to one tug, was necessarily attributable to both. Without such possible inference of mutual fault from the allegations of the petition, we respectfully submit that the court is in error.

III.

As a third reason for holding that if either tug was liable to surrender, both were, the court states that it appears from the petition that the "Hercules" as the leader of the tandem must necessarily have participated in the selection of the route and the direction of the movements of the tugs and tow. Granting that this

deduction from the averments of the petition is sound, did the fact of such participation on the part of the "Hercules" in the selection of the route and the direction of the movements of the tugs and tow, necessarily show that it caused or contributed to the pulling of the hawser off the towing machine by the raft. If so, how, may we ask? On the contrary, it did not, for it may well have been that the route and movements of tug and tow had nothing to do with any negligence which resulted in the raft pulling the hawser off the machine. It is certain that it did not necessarily have that effect.

Unless such pulling of the hawser from the towing machine was necessarily caused or contributed to by the "Hercules" in such selection of route and direction of the movements of the tugs and tow, it is erroneous, we respectfully submit, for the court to say, as it does in effect that if fault on that ground was attributable to either tug, it was attributable to both. To be attributable to both, negligent acts or omissions on the part of both must have conduced to the loss. It certainly does not appear that the participation of the "Hercules" in the selection of route and direction of movement of tugs and tow necessarily had anything to do with the pulling off of the hawser by the raft. Without such fault, surrender of the "Hercules" could not be required. The engaging in a common venture was alone not sufficient.

We respectfully submit, therefore, that the court erred in asserting that fact of participation by the "Hercules" in the selection of route and direction of movement of tugs and tow, as shown by the petition,

established that if one tug was liable to surrender, both were.

IV.

With none of the cases holding that the fact of engaging in a common venture is alone sufficient to require a surrender of two or more vessels, where one alone is at fault, but with all of the decisions adhering to the fundamental principle that surrender of any vessel must be conditioned upon fault being attributable, to it, we respectfully submit that the court erred in sustaining the decree of the district court in the absence of some averment in the petition showing fault necessarily attributable to both the "Hercules" and the "Dauntless". The fact that no such fault is shown should not deprive appellant of its right to the statutory limitation of liability. The rules of the Supreme Court, rule 56, expressly provide that in the proceedings the owner shall be at liberty to contest his liability or the liability of the vessel, providing that in his petition he shall state the facts and circumstances by reason of which the exemption is claimed. This appellant has strictly done by stating the version of the cause of the loss. Is it now to be denied the right of such limitation in this court because it does not allege negligence alone on the part of one tug? If so, then it would necessarily follow that to obtain such right of limitation, liability to some degree would have to be confessed. The court would, by the enforcement of any such doctrine, set aside rule 56 of the Supreme Court, permitting a contest of liability.

Liability can only be contested if denied; if denied, the petition will not show liability on the part of any vessel to the venture. It follows, therefore, that if a shipowner is to enjoy the rights granted by statute and by Supreme Court rule, his petition will contain no allegation showing negligence attributable to his vessel, whether there be one or more engaged in the venture. This is precisely what appellant has done in the case at bar. The court cannot, therefore, hold that the petition is insufficient to confer jurisdiction upon the District Court because it does not show that the "Dauntless" is alone liable.

The question of the liability of appellant for any act of the "Dauntless" is an issue upon which appellant has the right of trial in this proceeding.

It surely cannot be the intent of this court to deny to appellant the right to have its right of limiting its liability to the value of the "Dauntless", tried. If the evidence upon a trial should show that the "Dauntless" alone committed some fault which caused the hawser to pull off the towing machine, this court would certainly not say that the "Hercules", not participating in the fault, would also have to be surrendered. If not, then appellant is entitled to have each question of fault, and the right to limit its liability to the value of the "Dauntless" tried out. Before what tribunal can it be done? Certainly not in the action at law now pending in the State court for that court is alone concerned with the question of damages, determinable upon an actionable wrong having been committed by appellant through some officer or agent, of one or both of the tugs. The jury will not make a finding as to who, or which tug

committed a wrong, but would only concern itself with the question as to whether a wrong was done. Its determination of that question will find expression through an award or non-award of damages. It will not point out the wrongdoer! Where then is this right of fault and limitation to be determined? Nowhere, except in the District Court in the very character of proceedings instituted by petitioner.

In these circumstances, therefore, we respectfully submit that this honorable court has erred in affirming the decision of the District Court dismissing appellant's petition for limitation of liability.

We respectfully request that the court set aside the decision already given in the case, and afford us an opportunity of further discussing the questions therein involved.

Dated, San Francisco,
December 16, 1914.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

IRA A. CAMPBELL,
Of Counsel for Appellant and Petitioner.